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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

LEMOND CONSTRUCTION COMPANY,

Petitioner,

v.

RICHARD WHEELER,
ADMINISTRATOR OF THE ESTATE OF
CHRISTOPHER GENE WHEELER,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Was the Petitioner's right to due process violated by the fact that the jury in a wrongful death case was permitted, in accordance with Alabama law, to impose a punitive damage award of $3.5 million against the Petitioner based on an act of simple negligence, without any apportionment of the award based on the degree of fault among the parties?

## LIST OF PARTIES

The caption contains the names of all parties who appeared before the Supreme Court of Alabama.

## LIST OF PARENT COMPANIES OR NONWHOLLY OWNED SUBSIDIARIES

There are no parent companies or nonwholly owned subsidiaries of Lemond Construction Company.

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## OPINIONS BELOW

The opinion of the Supreme Court of Alabama, issued on September 29, 1995, has not yet been reported. It is reproduced in the Appendix at 1. The trial court's order denying a new trial and denying a remittitur of damages is set out in the Appendix at 43.

## JURISDICTION

The decision of the Supreme Court of Alabama was entered on September 29, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

The suit was brought by the administrator pursuant to Ala. Code Ann. § 6-5-410. The Alabama Supreme Court's opinion mistakenly referenced § 6-5-391. These two statutes are set out in their entirety in the Appendix at 65 and 66. The most pertinent provision of § 6-5-

410, governing actions in cases involving wrongful death, states:[1]

> [A] personal representative may commence an action and recover such damages as a jury may assess . . . for the wrongful act, omission or negligence of any person, persons, or corporation.

## STATEMENT OF THE CASE

This case arises from the crash of an automobile driven by 15-year-old Jason Colley, in Lanett, Alabama, at 3:30 a.m. on Sunday, June 6, 1992. Jason, who had turned 15 just the day before and was not yet eligible for a driver's license (the minimum age being 16), was coaxed into taking his parents' car for a joyride in the middle of the night by his best friend, 13-year-old Christopher Wheeler. After a city police officer observed their car traveling the wrong way down a one-way street and attempted to stop the car, Christopher encouraged Jason to elude the police. At Christopher's urging, the boys then began to race through the city streets at speeds of up to 70 m.p.h., disregarding at least four stop signs and driving across a blind intersection of a major state highway without looking or even slowing down. Shortly after going airborne over a railroad crossing, the boys' car went out of control on Magnolia

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[1] Ala. Code Ann. § 6-5-391 contains the identical language "such damages as the jury may assess" regarding actions brought by a parent.

Road. The car left the road and struck a tree, killing Christopher instantly.

For about six weeks prior to this time, Lemond Construction Company, a small family-owned contracting company run by Carlton Lemond, had been laying sewer lines for the City of Lanett under a HUD Community Block Development Grant. As part of this federally funded project, Lemond was required to dig trenches across certain city streets to install sewer pipe. The contract between the City and Lemond called for these trenches to be refilled with crushed stone until the end of the project, when the streets would be repaved. In the week before the death of Christopher, Lemond had been working on Magnolia Road and had dug trenches and refilled them in accordance with the contract.

In August 1992, under Ala. Code Ann. § 6-5-410, Christopher Wheeler's father, as administrator of his son's estate, filed a wrongful death action against both the City of Lanett and Lemond. The basis of the suit against the City was the claim that the City and its police officers had acted in a negligent or reckless and wanton manner in pursuing the car driven by Jason Colley, and had negligently or wantonly failed to maintain Magnolia Road in a safe condition. The allegation against Lemond was that it had negligently or wantonly failed to leave Magnolia Road in a safe condition at the end of the workday prior to the crash, and failed to place a warning sign. Lemond countered that the boys would have ignored such a sign just as they did the police blue lights, sirens, stop signs, and speed limits. Wheeler alleged that the acts of the City and Lemond combined to cause

Christopher's death. Lemond's Amended Answer raised constitutional defenses, including that the requested relief would be violative of the due process clause of the fourteenth amendment to the United States Constitution (App. at 55).

The City settled the case by paying Wheeler $75,000. Jason Colley's family paid Wheeler $25,000 in settlement. The case was tried solely against Lemond and the result was a $3.5 million verdict.

At trial, the trial judge summarily denied Lemond's constitutional arguments. Although acknowledging that it was "ludicrous" to allow the jury "to punish [Lemond] without benefits provided by the criminal corrections system," the judge indicated that he was bound by the precedent of the Supreme Court of Alabama (App. at 53). Wheeler argued that Lemond had breached the contract and hence its duty by not filling the top of the trench on Magnolia Road with temporary asphalt, rather than the crushed stone which was used. Lemond's evidence, including testimony from the City's street superintendent and the City's independent consulting engineer who actually wrote the contractual requirements, proved that the trenches were properly filled with crushed stone because both Lemond and the City agreed that their contract specified crushed stone. The City had always used crushed stone on such projects. The use of crushed stone was discussed and specified at the bid conference. Despite this agreement between the actual parties to the contract, Wheeler was permitted to use an as an "expert witness" a college professor from Tennessee to testify that the contract required the use of temporary

asphalt, based on an alleged inconsistency in the boilerplate language.

Numerous police officers and residents of Magnolia Road testified that the road surface was in a safe condition at the time of the accident. Wheeler countered with witnesses who stated that the trench was not filled to the surface of the street, and that there were depressions of up to several inches in the filled trenches. The official police report and photographs depicted no such deep trenches. While on the stand, the investigating officer produced for the first time a report depicting such matters. This undated report was not filed nor disclosed to the chief of police or Lemond. Wheeler's expert testified that the contract required Lemond to post warning signs at the site, which was not done. Lemond's evidence showed that the signs were not required after daytime working hours because the trenches were filled and the street was safe and re-open for normal driving at the 25 mph speed limit. Finally, Wheeler attempted to show wantonness on the part of Lemond by bringing in a laborer who had been fired by Lemond for poor performance. This witness stated that he had heard Lemond's foreman say prior to the accident that he was tired of hearing complaints about the road, and was "going to take the cheapest way out." Lemond was not permitted to impeach this witness with the fact that he was coincidentally released from jail the previous day after somehow coming up with a lump sum of money to pay back-due child support, and had been driven to court by an employee of the law firm representing Wheeler.

At the close of Wheeler's presentation of evidence, Lemond moved for a directed verdict on the basis of the fact that the accident was not caused by the condition of Magnolia Road, but was in fact caused by the boys' reckless and illegal actions in fleeing from police, speeding through stop signs, a railroad crossing, and a stoplight, and ignoring police sirens and the 25-mph-speed limit in a residential area. The motion was denied, as was a second motion for directed verdict made at the close of all of the evidence. The court directed a verdict against Lemond on its affirmative defense of contributory negligence, holding that Lemond failed to overcome the Alabama presumption that a 13-year-old is incapable of contributory negligence. The trial judge rejected Lemond's contention that Christopher engaged in adult activity and was thus barred by contributory negligence.

The case was submitted to the jury in accordance with Ala. Code Ann. § 6-5-410 and the case law construing it, which required punitive damages against Lemond for acts or omissions of simple negligence (App. at 60-64). Wheeler's lawyers asked for $7 million. The jury then returned a verdict of $3.5 million in punitive damages against Lemond. Subsequently, the trial judge denied motions for a judgment n.o.v., a new trial, or a remittitur of damages, raising, among other matters, that its constitutional right to due process was violated by the imposition of punitive damages for simple negligence, especially when such damages are not apportioned based on degree of fault (App. at 57). The trial court overruled Lemond's objections by denying the post-trial motion (App. at 43).

On appeal to the Supreme Court of Alabama, Lemond raised five issues concerning trial errors and further argued that a remittitur was required because the excessive punitive damage award was a serious miscarriage of justice. In addition, in Section VII of its brief, Lemond cited this Court's discussion in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 18 (1991), regarding the need for fundamental fairness in the awarding of punitive damages, and contended that, given the circumstances of the case, Lemond's substantive and procedural due process rights were violated by the punitive damage award. The four pages[2] of Section VII of the Brief to the Supreme Court of Alabama are set out in the Appendix at 23. In Section VII, Lemond argued that the punitive damage award violated the fifth, eighth, and fourteenth amendments because the jury was not given adequate standards for the assessment of punitive damages, punitive damages were permitted for simple negligence, and there was no apportionment among joint tortfeasors, thus allowing imposition of punitive damages upon Lemond for actions of others.

The Supreme Court of Alabama upheld the judgment of the trial court in a divided opinion. Inexplicably, the majority of the court[3] declined to address

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[2]Because of Rule 58 of the Alabama Rules of Appellate Procedure, regarding the length of briefs, space was limited for each issue raised before the court.

[3]Actually, the decision was made by only four of the nine justices on the court. Lemond filed a motion to recuse

the constitutional issue which had been raised in Section VII of the brief on appeal, stating simply that "Lemond's argument on this issue lacks the specificity required in order for this Court to address it" (App. at 17). In a separate opinion, Justice Maddox pointedly disagreed with this conclusion by stating that "I cannot find such a deficiency in the appellant's brief," and argued that the case was actually a perfect vehicle for addressing the important constitutional issues raised by Lemond. To demonstrate that the issues had in fact been properly raised, he took the extraordinary step of reprinting Section VII of Lemond's brief in its entirety in his opinion (App. at 23). Justice Houston's dissenting opinion focused on the trial judge's erroneous decision to bar a contributory negligence defense and to permit Wheeler's expert to testify that Lemond breached the contract.

Following the decision of the Supreme Court of Alabama, Wheeler refused to agree to a stay and the Supreme Court of Alabama refused to issue a stay pending the submission of a petition for a writ of certiorari. Lemond applied to this Court for a stay of execution of the judgment

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Justice Kenneth Ingram, whose son Kenneth Ingram, Jr. was Wheeler's trial attorney, and former Chief Justice Sonny Hornsby, whose son Clay Hornsby is also a partner in the Alexander City, Alabama, law firm representing Wheeler. The motion was never ruled upon but when the court's opinion was issued, these two members, along with Justice Kennedy, did not participate.

and on November 6, 1995, the Court granted the application.

## REASONS FOR GRANTING THE WRIT

What transpired in the Alabama courts in this case can be viewed only as a caricature of justice gone awry. Through the application of the unique Alabama wrongful death law, a jury has been permitted to impose an enormous multimillion-dollar punitive damage award against a public contractor on the basis of a finding of simple negligence, without the possibility of apportionment of the award between the other parties who were far more culpable in the events which led to the death at issue. The case thus epitomizes the unconstitutionality of permitting the imposition of unlimited punitive damages against merely negligent parties. The award in this case, and the statutory scheme which permitted it, so plainly violate due process and so clearly conflict with the recent precedents of this Court that the Court must grant the writ of certiorari. Also, this case presents the Court with the opportunity to clarify when, if ever, persons who have been merely negligent may have such severe and ruinous punishment assessed against them.

It must be recognized that the jury in this case was instructed on both wantonness and negligence, and that the trial court and Supreme Court of Alabama found that some evidence of wantonness had been introduced at trial. However, the jury was in fact permitted to base its punitive damages award on the basis of simple negligence. In a wrongful death

case in Alabama, there is no way to know if the jury has based its award calculation on simple negligence or wantonness, for it is not possible for the jury to specify the basis of its verdict.

I

Alabama is the only state in the union, and is apparently the only jurisdiction in the world, which permits the imposition of punitive damages against a tortfeasor for injuries caused by conduct which is found to be merely simple negligence.[4] Moreover, it does so in a system which places no cap on punitive damages,[5] and which does not permit the

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[4]The laws and statutes of our fifty states were painstakingly researched to prove this point as outlined in four pages of footnotes in Tatum v. Schering Corp., 523 So. 2d 1042, 1052-1056 (Ala. 1988). As discussed in Tatum, the punitive damage requirement comes from an interpretation of the statute. The statutes, §§ 6-5-410 and 6-5-391, do not use the terms "punitive damages" or "punishment."

[5]A $250,000 cap on punitive damages imposed under Ala. Code Ann. § 6-11-21 was held unconstitutional in Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993), as violative of the Alabama Constitution's provision guaranteeing the right to a jury. Legislation setting a cap on punitive damages in wrongful death cases involving health-care providers was recently declared unconstitutional in Smith v. Schulte, Ms. 1930362, 1930459 (Ala. Aug. 18, 1995).

apportionment of damages between a merely negligent tortfeasor and others who may have been considerably more culpable.

In other contexts Alabama adheres to the rule that punitive damages should be awarded only where the defendant acts with oppression, maliciousness, wantonness, or extreme recklessness, see, e.g., Heil Co. v. Crowley, 659 So. 2d 105 (Ala. 1995) (punitive damages for maliciousness in retaliatory firing of employee); Ex parte Smith, 412 So. 2d 1222 (Ala. 1982) (punitive damages for fraud of automobile dealer); Magic Home Builders, Inc. v. Jolly, 539 So. 2d 303 (Ala. Civ. App. 1988) (punitive damages for fraud of contractor). Alabama's wrongful death statutes, Ala. Code Ann. §§ 6-5-391 and 6-5-410, however, have repeatedly been construed to allow the assessment of punitive damages against any tortfeaser, even those guilty only of simple negligence, where death results.[6] See, e.g., Campbell v. Williams, 638 So. 2d 804 (Ala.), cert. denied, 115 S. Ct. 188

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[6]This distinction was recently codified in a provision of the 1987 Tort Reform Act. Ala. Code Ann. § 6-11-20 states in part that "[p]unitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff." Moreover, the lesser "substantial evidence" standard applies in death cases rather than the "clear and convincing" standard.

(1994) (punitive damages awarded in medical malpractice against physician for simple negligence in treating patient); Alabama Power Co. v. Turner, 575 So. 2d 551 (Ala. 1990), cert. denied, 500 U.S. 953 (1991) (punitive damages awarded for simple negligence of power company); Central Alabama Electric Cooperative v. Tapley, 546 So. 2d 371 (Ala. 1989) (simple negligence of power company resulted in award of punitive damages). Moreover, juries in wrongful death cases are instructed that they must impose only punitive damages, and may not award compensatory damages. Campbell v. Williams, supra, 638 So. 2d at 809; Black Belt Wood Co. v. Sessions, 514 So. 2d 1249, 1262 (Ala. 1986).

Juries which are given the authority to assess these unlimited punishments do so with only the most rudimentary standards. In this case, for example, the jury heard no evidence and received no instructions concerning compensatory damages, which could have guided it in assessing punitive damages.[7] Rather, the jury was told only that the imposition of punitive damages was "entirely discretionary with the jury," and that in calculating an award it "must take into consideration the character and degree of the wrong as shown by the evidence in the case and the necessity of preventing similar wrongs" (App. at 62). The court

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[7]In fact, under Alabama law, evidence concerning compensatory damages, such as a person's earning capacity, education, health, occupation, age, school performance, past earnings, future expected earnings, life expectancy, and other material matters, is not admissible.

also instructed the jury that "[p]unitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. The degree of reprehensibility of defendant's conduct should also be considered" (App. at 63). The lack of adequate standards in this case was borne out by the fact that the jury awarded $3.5 million, precisely one-half of the $7 million requested by Wheeler's lawyers--itself an arbitrary figure that was simply pulled from thin air.

In addition, the Alabama courts have long held that nothing in the wrongful death statute authorizes a jury to apportion damages among joint tortfeasors, and that the statute does not recognize degrees of culpability among joint tortfeasors. Campbell v. Williams, supra; Tatum v. Schering Corp., 523 So. 2d 1042, 1044-45 (Ala. 1988); Bell v. Riley Bus Lines, 257 Ala. 120, 57 So. 2d 612 (1952).

It is important to note that, while under the Alabama wrongful death statutes the jury was permitted to subject Lemond to unlimited punitive damages on the basis of simple negligence, and in fact imposed a $3.5 million judgment, Lemond could not be subject to any punishment under the criminal laws for simple negligence under either the common law or the Alabama Code. As in other states, Alabama has always required criminal negligence or recklessness in order to impose criminal liability in such cases, see Fitzgerald v. State, 112 Ala. 34, 20 So. 966 (1895) (common-law offense of manslaughter required "gross," wicked," or "criminal" negligence); Ala. Code Ann. § 13A-6-4 (criminally negligent homicide); Ala. Code

Ann. § 13A-6-3 (manslaughter), and defines criminal negligence as requiring "a gross deviation from the standard of care." Ala. Code Ann. § 13A-2-2(4). This is uniformly held to be a significantly higher degree of negligence than is required for tort liability. See Ala. Code Ann. § 13A-6-4 commentary. Moreover, the maximum penalty for committing the crime of criminally negligent homicide is a $2,000 fine, Ala. Code Ann. § 13A-5-12, and one year in a county jail. Ala. Code Ann. § 13A-5-7.

In recent cases upholding the constitutionality of the Alabama system for awarding damages in wrongful death cases, the Alabama courts have found that the Legislature's decision to allow unlimited punitive damages against a merely negligent tortfeasor is justified by the state's interest in the sanctity of human life, and by "society's desire to punish those whose conduct results in the loss of human life." Alabama Power Co. v. Turner, supra, 575 So. 2d at 554 (quoting Central Alabama Electric Cooperative v. Tapley, supra, 546 So. 2d at 376). The courts have noted that the predecessor to § 6-5-410 was enacted in 1852 and since 1860 has not been substantially modified by the Legislature, despite impassioned dissenting opinions urging it to do so. See Tatum v. Schering Corp., supra, 523 So. 2d at 1057; Campbell v. Williams, supra, 638 So. 2d at 808-12. In essence, the Supreme Court of Alabama has concluded that "[a]ny change in the interpretation of the statute should be left to the legislature." Campbell v. Williams, supra, 638 So. 2d at 812. Such an approach does not comport with due process. The courts must remedy a due process violation rather than waiting on

the possibility that a group of legislators will recognize a constitutional violation and take action to correct it.

Lemond would be remiss if it did not address the decision of Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927), a decision of this Court which upheld a $9,500 award against a department store whose employee negligently operated an elevator, resulting in the death of a customer. The Court in Louis Pizitz appeared to hold that there was no constitutional bar to the imposition of punitive damages for acts of simple negligence. However, a close examination of the precise ruling of the Court indicates that its decision focused not on the validity of the imposition of punitive damages for mere negligence, but rather addressed the issue of whether it was permissible to impose punitive damages on an employer for the actions of an employee, a result which was characterized as "a new form of vicarious liability." Id. at 115. The present case does not present any vicarious liability issues. In any event, in reaching its conclusion, the Court in Louis Pizitz stated:

> In defining the scope of the act, the state court has pointed out that the extent of the culpability and the amount of the verdict are for the jury and that its findings is not to be disturbed unless the verdict is 'induced or reached on account of prejudice, passion, or other improper motive or cause.' (citation omitted) The case was argued here on the assumption that its scope was

> thus limited and we so interpret the statute.

Id. at 114-15. Quite a bit has changed in 68 years. When Calvin Coolidge was President, no one could have dreamed of this scenario.

In Louis Pizitz, this Court quoted the Alabama law that the wrongful death statute was "remedial" and "not penal." This Alabama state court assumption squarely conflicts with this modern Court's view on what constitutes a penal statute. The Court has held in United States v. Halper, 490 U.S. 435, 448 (1989), that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment." For this reason, and for other reasons discussed below, the decision in Louis Pizitz plainly can no longer be seen as having any valid precedential value on this issue.[8]

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[8]While Louis Pizitz Dry Goods Co. v. Yeldell, supra, 274 U.S. at 116, was cited in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 14 (1991), the Court did so only with regard to the vicarious liability issue, and specifically did not condone the imposition of punitive damages for simple negligence, instead stating that "[i]mposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented'" (emphasis added).

II

This Court has repeatedly recognized in recent years that huge punitive damage awards raise significant constitutional issues. In the past few terms of the Court alone, concern over the constitutionality of certain punitive damage awards has led the Court to examine whether the excessive fines clause of the eighth amendment applies to punitive damages awards in civil cases between private parties, see Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), whether the imposition of $840,000 in punitive damages against an insurance company for the willful and fraudulent theft by its agent was unconstitutional, see Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991), whether it was constitutional to award a $10 million punitive damage award on a judgment of $19,000 for actual damages in a fraud case, see TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993), whether a state could constitutionally preclude judicial review of a jury's punitive damage award, see Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994), and whether a $2 million punitive damage award against an automobile manufacturer for intentional or reckless fraud, which was 500 times the compensatory damages awarded, was violative of the fourteenth amendment. See BMW of North America v. Gore, No. 94-896 (oral argument on Oct. 11, 1995).[9]

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[9]In addition, as noted by the Court in Pacific Mutual Life Insurance Co. v. Haslip, supra, 499 U.S. at 9-12, in various cases individual Justices have

The Court has recognized that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." Honda Motor Co. v. Oberg, supra, 114 S. Ct. at 2340. Yet the numerous opinions issued by the Justices two years ago in TXO Production, and the inability of any opinion to gain the support of a majority of the Court, demonstrate that the precise scope of the protection of the due process clause in punitive damages cases--and even the tests to be used to resolve constitutional issues in such cases--remains unsettled and requires further elucidation from the Court. Moreover, in the course of its recent examinations of the constitutionality of punitive damages awards, the Court has not as yet directly addressed the important issue presented in this case: whether it is violative of due process to impose punitive damages for acts of simple negligence, particularly where there is no cap on punitive damages, the jury is given insufficient standards for reaching its award, and there is no possibility for apportionment of the damages award among tortfeasors according to culpability.

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expressed doubts about the constitutionality of certain punitive damages awards under the due process clause. See, e.g., Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., supra, 492 U.S. at 280-82 (Justice Brennan, concurring, joined by Justice Marshall); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 76-80 (1988) (Justice O'Connor, concurring in part and dissenting in part, joined by Justice Scalia).

There can be no doubt that the punitive damages awarded in this case were intended to be, and in fact were, a punishment. United States v. Halper, supra, 490 U.S. at 447 n.8 ("punitive damages, available in civil cases, serve punitive goals"). Permitting the imposition of such a punishment on the basis of mere negligence in the circumstances of this case simply cannot be squared with the principles of due process now recognized by this Court.

In a variety of contexts, this Court has recognized that punitive damages may be properly imposed only in order to punish persons who cause harm to others and who act with oppression, malice, willfulness, or wanton and reckless indifference to the consequences of their actions. In Smith v. Wade, 461 U.S. 30 (1983), for example, the Court thoroughly examined the history of punitive damages in American jurisprudence and found that, by the time of the adoption of the Civil Rights Act of 1871 (and also the fourteenth amendment), both state and federal courts consistently held that it was unjust to impose such damages in situations in which the defendant acted only with simple negligence. The Court noted that in Philadelphia, Wilmington & Baltimore Railroad v. Quigley, 62 U.S. (21 How.) 202, 214 (1859), a diversity libel suit, the Court held that it was erroneous to permit the jury to return a punitive damages award without adequate explanation that the defendant had to have inflicted injury maliciously or wantonly, and defined a malicious act as one undertaken with "criminal indifference to civil obligations." Subsequently, in Milwaukee & St. Paul Railroad v. Arms, 91 U.S. 489, 495 (1876), the Court held that to assess

punitive damages, "there must have been some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences," and held erroneous an instruction which could have been misinterpreted to permit punitive damages for ordinary negligence. In fact, through modern times the Court has often indicated in various opinions that the imposition of punitive damages is not appropriate or justified where only simple negligence has been shown. See, e.g., Smith v. Wade, supra; City of Newport v. Fact Concerts, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are . . . to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct"); International Board of Electrical Workers v. Foust, 442 U.S. 42, 61 (1979) ("No court . . . has ever held negligence can form the basis for a proper punitive damages award") (Justice Blackmun, concurring, joined by Chief Justice Burger and Justices Rehnquist and Stevens); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974) (punitive damages are prohibited in private defamation actions absent defendant's "knowledge of falsity or reckless disregard of the truth").

Alabama's unique deviation from this well-accepted common-law rule that punitive damages are permitted only to punish intentional, malicious, or wanton behavior, and to deter others from engaging in that type of behavior, raises a presumption that its practice violates the due process clause. See Honda Motor Co. v. Oberg, supra, 114 S. Ct. at 2339 ("As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional

analysis"). Just as in Honda Motor, this case brings to the Court an issue concerning a state punitive damages practice which, while long established in the state, is completely at odds with the statutory and common-law rule in every other state.

The substantive and procedural protections offered by the due process clause in punitive damages cases are still being developed by the Court. Nevertheless, a number of principles have emerged which control the resolution of this case. First, at least a plurality of the Court has found that there is a substantive due process right that punitive damages be reasonable. Id. at 2335; see TXO Production Corp. v. Alliance Resources Corp., supra, 113 S. Ct. at 2726 (Justice Scalia, concurring). In addition, the Court has held that the due process clause mandates that the punishment imposed by a punitive damage award may only be meted out in accordance with adequate standards to guide the jury, and there must be both meaningful and adequate judicial review. Honda Motor Co. v. Oberg, supra, 114 S. Ct. 2341; Pacific Mutual Life Insurance Co. v. Haslip, supra, 499 U.S. at 22.

Underlying all of the recent decisions of the Court regarding punitive damages and due process is the common assumption or understanding that such damages are awarded only against persons or entities on the basis of a finding of intentional, malicious, or wanton behavior. Indeed, the opinions of the Justices can only be understood on the basis of that assumption. Thus, for example, while the Court in Pacific Mutual Life Insurance Co. v. Haslip, supra,

upheld the common-law method of assessing punitive damages, it did so only in the context of an action based on intentional fraud, and recognized in its opinion that punitive damages were justified under the common law against a defendant engaged in "'aggravated misconduct or lawless acts,'" on the basis of "'the enormity of his offence[.]'" 499 U.S. at 16 (quoting Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1852)). In fact, the very basis for the Court's holding in Pacific Mutual that the imposition of punitive damages by a jury in a civil case is not in and of itself unconstitutional was that a practice so well accepted at common law throughout every state and federal court could not be per se unconstitutional. 499 U.S. at 17. This principle has no application in the present case, obviously, for the historical record is completely different: there is no well-accepted body of common law supporting the imposition of unlimited punitive damages for simple negligence. Accordingly, the very basis of the holding in Pacific Mutual supports the conclusion in this case that the punitive damages award was unconstitutional. Indeed, this case does not involve common law at all. It concerns a statutory cause of action.

Similarly, in TXO Production Corp. v. Alliance Resources Corp., supra, the plurality opinion upheld a $10 million punitive damages award, but did so largely on its assessment of the extreme, fraudulent conduct of the defendants. The Court found that the award was not so extreme as to violate due process because the facts showed that "the petitioner set out on a malicious and fraudulent course" to harm the respondent, and that "the bad faith . . . scheme employed in this case was part of a larger pattern of fraud,

trickery, and deceit[.]" 113 S. Ct. at 2722. Justice Kennedy's concurring opinion specifically noted that "a case involving vicarious liability, negligence, or strict liability might present different issues." Id. at 2726 (Justice Kennedy, concurring) (emphasis added). This is that case.

In short, these recent cases have upheld punitive damage awards as reasonable and, thus, constitutional, in large part because of the finding that it is, and has long been held to be, appropriate to assess punishment--even heavy punishment--against persons who have harmed others through actions which were intentional, malicious, or wanton. Such a finding cannot be made in a case in which a jury has been permitted to impose an enormous punitive damages award for simple negligence. In fact, such an award conflicts with the Court's general views on when extreme punishment may be imposed.

The Court has long recognized in its decisions that the due process clause limits the extent of punishment imposed upon those who do not act intentionally or wantonly. For example, in the criminal context, "[t]he existence of a mens rea is the rule . . . rather than the exception[.]" Dennis v. United States, 341 U.S. 494, 500 (1951). The Court has held that punishment based on strict liability or simple negligence is prohibited except in extremely limited situations. For example, in United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978) (citations omitted), the Court noted:

> "While strict liability offenses . . . do not invariably offend

> constitutional requirements, the limited circumstances in which Congress has created and this Court has recognized such offenses, attest to their generally disfavored status."

Thus, while the Court has upheld the imposition of punishment without evidence of criminal intent with respect to certain well-defined regulatory offenses, where strict liability was deemed essential to the protection of public health, see, e.g., United States v. Freed, 401 U.S. 601 (1971) (possession of unregistered hand grenades); United States v. Dotterweich, 320 U.S. 277 (1943) (distribution of adulterated drugs), it has done so in large part because the "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." Morrisette v. United States, 342 U.S. 246, 256 (1952). However, where statutes have sought to impose severe penalties for offenses based loosely on the common law, the Court has either insisted on a mens rea requirement, id. at 256 (larceny); United States v. United States Gypsum Co., supra (price fixing); Staples v. United States, 114 S. Ct. 1793 (1994) (possession of machine gun), or declared the statute unconstitutional in the absence of such a requirement. Colautti v. Franklin, 439 U.S. 379, 395 (1979) (homicide based on doctor's failure to use appropriate test for fetus viability; Court also relied on vagueness of prohibition). Justice Blackmun's opinion in Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960), succinctly summarized the Supreme Court's case law on this point:

> From these cases emerges the proposition that where a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

See also United States v. Halper, supra, 490 U.S. at 447 n.8 ("strict liability crimes are principally directed at social betterment rather than punishment of culpable individuals"); Staples v. United States, supra, 114 S. Ct. at 1802-04 (summarizing principles).

In addition, the Court has on at least one occasion set aside a civil penalty on due process grounds because it was a punishment imposed without a showing of intentional or reckless conduct. Southwestern Telegraph & Telephone Co. v. Danher, 238 U.S. 482 (1915). Focusing on the company's lack of mental intent to violate a known duty, the Court found that, in such circumstances, "to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a

taking of its property without due process of law." Id. at 491. Other cases support the proposition that, in the absence of fraudulent or malicious behavior, the due process clause forbids civil punishments which are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." St. Louis, Iron Mountain & Southern Railway v. Williams, 251 U.S. 63, 66-67 (1919); see Missouri Pacific Railway v. Tucker, 230 U.S. 340, 351 (1913) (holding that a penalty violated due process because it was "grossly out of proportion to the possible actual damages").

III

This appeal rests on the accepted premise that punitive damages are not appropriate for simple negligence. It does not ask this Court to formulate guidelines where punitive damages have been imposed for intentional and malicious wrongdoing. This appeal seeks to eliminate the unique Alabama rule requiring punitive damages for simple negligence. Whereas it is demanding to agree on factors to govern punitive damages in oppressive fraud and intentional injury cases, it is not difficult to agree that simple negligence should not be punished with punitive damages.

## CONCLUSION

For all of the foregoing reasons, the Petitioner, Lemond Construction Company, requests the Court to grant this Petition for a Writ of Certiorari to the Supreme Court of Alabama and accept this case for review.

Respectfully submitted,

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DECISION OF THE SUPREME
COURT OF ALABAMA

SEP 29 1995
CLERK
SUPREME COURT OF ALABAMA

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SUPREME COURT OF ALABAMA

SPECIAL TERM, 1995

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Lemond Construction Company

v.

Richard C. Wheeler

Appeal from Chambers Circuit Court
(CV-92-145)

PER CURIAM.

Lemond Construction Company (hereinafter referred to as "Lemond") appeals from a judgment entered on a jury verdict in a wrongful death action rendered in favor of the plaintiff, Richard Wheeler, the father of a minor child, Christopher Wheeler. We affirm.

I.

In the early morning hours of June 6, 1992, Christopher ("Chris") Wheeler, age 13, was a passenger in an automobile driven by Jason Colley, then age 15. He was killed when Jason lost control of the vehicle and the vehicle struck a group of trees.

Chris and Jason were friends and neighbors in Lanett. On Friday, June 5, the night of Jason's 15th birthday, Chris was "sleeping over" at Jason's home. Both children were to leave the next morning with Chris's parents for a trip to Florida.

However, sometime after midnight, the boys decided to take Jason's father's car for a ride. Jason drove, and they rode without incident for about a half-mile before returning home. Sometime later, but still in the early morning of June 6, Chris wakened Jason and the two decided to take the car for another drive. While riding around town, a City of Lanett police officer noticed their vehicle. Because Jason had driven into an intersection marked "Do No [sic] Enter," the officer suspected that the driver of the vehicle might be under the influence of alcohol and began to follow it. When Jason saw that a police patrol car was following him, he attempted to elude the patrol car, and a high speed-chase [sic] ensued. The evidence indicated that as the chase proceeded down Magnolia Road Jason's vehicle may have reached speeds as great as 70 miles per hour. However, after crossing railroad tracks at a high

speed, Jason became frightened and slowed down to 35 or 40 miles per hour. The vehicle then came upon an unmarked road construction area, where Jason lost control, and the vehicle struck two large trees. Both boys were thrown from the car, and Chris suffered a fatal head injury. The area of Magnolia Road "under construction" was part of a project to upgrade the city's sewer system. Lemond was the contractor employed by the city to perform the work on that project.

In August 1992, Richard Wheeler filed a wrongful death action against the City of Lanett and Lemond. The complaint alleged that the city and its police officers had acted in a negligent or reckless and wanton manner in pursuing the vehicle driven by Jason and that the city had also negligently and/or wantonly failed to maintain Magnolia Road in a safe condition. It further alleged that Lemond had negligently and/or wantonly failed to leave the roadway in a safe condition at the end of a workday and had negligently and/or wantonly failed to place warning signs that Wheeler says were needed to alert motorists to the condition of the roadway. Wheeler alleged that the negligence and/or wantonness of the defendants combined or concurred to cause Chris's death.

Wheeler eventually settled his claim against the City of Lanett, and the city was dismissed from the action. Lemond answered the complaint by denying the allegations and asserting the defenses of assumption of the risk and contributory negligence. It also asserted that the

accident was proximately caused by an intervening cause unrelated to any of its own acts or omissions. The case went to trial in November 1993.

At trial, Wheeler argued that Lemond had breached its duty of care to the public by failing to perform the construction work in accord with the plans and specifications prepared for the city by Engineering Service Associates, Inc. As a part of the project, trenches were dug across the road surface so that sewer pipe could be laid beneath the road. Once the pipe was laid in the trench, the trench was filled with gravel to within a few inches of the road surface. The last few inches of the trench were then filled to level with the road with a material known as "crusher run," a type of crushed stone, prior to later final road resurfacing. Wheeler argued that the contract required the use of temporary asphalt, rather than "crusher run," which can be dislodged from the trench by vehicular traffic. In contrast, Lemond argued that the contract called for the use of "crusher run" as the top layer of fill material. Wheeler offered evidence that the trenches in Magnolia Road were as much as eight inches deep at the time of Chris's fatal accident and that in that condition the road was not safe to drive an automobile on. Lemond offered contradictory testimony indicating that the road surface was in a safe condition when its employees left the work site at the end of the day on June 5 and at the time of the accident. Wheeler offered evidence that Lemond was required by the contract to post warning signs or other

devices along the roadway to warn motorists of the construction area. Lemond argued that such signs were not required because the road was always in a normal driving condition when it was opened to regular traffic.

Lemond moved for a directed verdict in its favor at the close of Wheeler's case-in-chief, asserting that Jason's actions as an underage, unlicensed driver fleeing from police were the intervening proximate cause of Chris's death, and that the death was not proximately caused by any condition of the roadway. The trial court denied the motion. Lemond renewed its motion for a directed verdict at the close of all evidence, but the court again denied it. At that time, Wheeler moved for a directed verdict on Lemond's assumption-of-the-risk defense and its contributory negligence defense, arguing that, as a 13-year-old, Chris could not have "assumed the risk" and could not have been contributorily negligent. The trial court granted the motion. The case was then submitted to the jury, which returned a verdict in favor of Wheeler and set punitive damages against Lemond at $3,500,000. Lemond moved for a J.N.O.V. or, in the alternative, a new trial or a remittitur of damages. After a hearing on the issues raised by Lemond, the trial court denied the motion. Lemond appealed.

II.

Lemond first argues that the trial court committed reversible error by allowing Wheeler's expert on construction contracts to testify as to whether Lemond

had complied with the technical specifications that were a part of the contract between the City of Lanett and Lemond. Lemond argues that it was error to allow an expert offered by a person not a party to a contract to testify as to the meaning of the contract. In response, Wheeler contends that because the trial court ruled, as a matter of law, that the contract was ambiguous, his expert's testimony was admissible to assist the jury in determining the meaning of the contract.

This case is not the usual case involving the meaning of a contract where the two parties to the contract dispute its meaning and are on opposite sides of a lawsuit. Here, the dispute is between Lemond, a party to the contract, and Wheeler, who is not a party to the contract. The meaning of the contract was at issue in this case because the contract requirements set forth in the project specifications regarding preparation of the road surface for the safe passage of vehicular traffic is one means by which Lemond's duty to the public could be measured. The trial court concluded, as a matter of law, that the contract was ambiguous as to whether the specifications required "crusher run" or temporary asphalt to cap the sewer pipe trenches until the road was resurfaced. Once a trial court determines that a contract is ambiguous or that its terms are of doubtful meaning, the question of the true meaning of the contract becomes a question for the jury to decide. Dill v. Blakeney, 568 So.2d 774 (Ala. 1990); Rivers v. Oakwood College, 442 So.2d 74 (Ala. 1983);

Miles College, Inc. v. Oliver, 382 So.2d 510 (Ala. 1980).

The trial court determined that expert testimony would assist the jury in interpreting the technical language in the engineering specifications. Expert testimony is admissible where technical trade terms and expressions in a contract are peculiar to a specialized discipline and are not of common knowledge. Flagg-Utica Corp. v. City of Florence, 275 Ala. 475, 156 So.2d 338 (1963). See Miles College, supra; W. L. Shepard Lumber Co. v. Atlantic Coast Line R.R., 216 Ala. 89, 112 So. 323 (1927); Richard P. Baer & Co. v. Mobile Cooperage & Box Mfg. Co., 159 Ala. 491, 49 So. 92 (1909); McCombs v. Stephenson, 154 Ala. 109, 44 So. 867 (1907). Furthermore, "[a] ruling on the admissibility of expert testimony is largely within the discretion of the trial court and will not be overturned unless that has been an abuse of discretion." Tidwell v. Upjohn Co., 626 So.2d 1297, 1300 (Ala. 1993). Accordingly, the trial court did not err in admitting the testimony of Wheeler's expert witness.

III.

Lemond next argues that the trial court committed reversible error by directing a verdict for Wheeler on the issues of assumption of risk and contributory negligence. It is well settled under Alabama law that a child between the ages of 7 and 14 is prima facie presumed incapable of contributory negligence; however, that presumption may be rebutted by evidence that the child

possesses the discretion, intelligence, and sensitivity to danger that an ordinary 14-year-old child possesses. Savage Industries, Inc. v. Duke, 598 So.2d 856 (Ala. 1992); Works v. Allstate Indemnity Co., 594 So.2d 60 (Ala. 1992); Birmingham Ry. Light & Power Co. v. Jones, 146 Ala. 277, 41 So. 146 (1906).[1] Chris was only 13 years of age; thus, the law presumes that he was incapable of contributory negligence. Similarly, because a child of that age is deemed incapable of appreciating the danger of a situation in which he may place himself, see Southern Express Co. v. Roseman, 206 Ala. 681, 91 So. 612 (1921), it follows logically that the child is also presumed incapable of assuming the risk of his action.

Given these presumptions, it was Lemond's burden of proof to present sufficient evidence that Chris possessed the discretion, intelligence, and sensitivity to danger that an ordinary 14-year-old child possesses, in order to make the issues of assumption of the risk and contributory negligence questions for the

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[1]In Lyle v. Bouler, 547 So.2d 506 (Aa. [sic] 1989), this Court adopted Restatement (Second) of Torts § 339 (1965) as the standard for determining when a child may recover for injuries sustained as a trespasser or a licensee on land. This Court also provided several elements useful in applying a "flexible" standard for determining when a child will be held responsible for his or her actions. We note that Lemond failed to offer substantial evidence as to these elements.

jury. Following Wheeler's motion for a directed verdict on those issues, the trial court stated:

> "I don't remember there being any evidence at all that suggested that this 13-year-old was capable of contributory negligence. The law very clearly places that burden on the defendant to show that, and there was no evidence offered in that regard.
>
> "There was plenty of evidence offered about contributory negligence itself. But you could have called his daddy as an adverse witness. You could have put him on the stand, and you could have asked him what sort of boy he was. You could have sneaked right up on his blind side and you could have proved that he was an alert, intelligence [sic] person. Y'all didn't do it, and that is my honest and complete finding on that point. I think that you didn't meet your burden of proof in that.
>
> "All right. So I won't be talking about contributory negligence, and I'll be going back through the [jury] charges and getting that part out of it. Likewise, I will not be charging [the jury] on any assumption of risk."

(Emphasis added.)

"The standard of review applicable to a directed verdict or to a denial of a motion for a directed verdict is whether the nonmoving party has presented substantial evidence in support of his position. If he has not, then a directed verdict is proper." K. S. v. Carr, 618 So.2d 707, 713 (Ala. 1993). Even viewing the evidence in a light most favorable to Lemond, we conclude that Lemond did not present substantial evidence that Chris possessed the discretion, intelligence, and sensitivity to danger of an ordinary child of 14 years. We believe that the trial court was correct; although Lemond presented evidence that Chris may have acted negligently, that evidence did not relate to the issue in question, whether Chris possessed certain mental capabilities equal to that of an ordinary 14-year-old child.

Lemond also argues that Chris was engaged in an "adult activity" at the time of his death and therefore should be held to an adult standard of care. Under Alabama law, a minor conducting an "adult activity" is required to exercise the same degree of care as an adult. Gunnells v. Dethrage, 366 So.2d 1104 (Ala. 1979). This argument might have some merit if Chris had been operating the automobile, an "adult activity." However, Chris was only a passenger riding in the vehicle; riding as a passenger is not an "adult activity." Although Lemond argues that Chris was more than a passive occupant in the vehicle, citing Jason's testimony that Chris urged him to attempt to elude the

police, it is undeniable that Chris was not in control of the vehicle at the time of the collision. Accordingly, the trial court correctly held that the rule recognized in Gunnells is not applicable to this case.

The trial court properly directed the verdict in favor of Wheeler on the issues of contributory negligence and assumption of the risk.

IV.

Lemond argues that the trial court committed reversible error by denying its motion for a directed verdict in its favor based upon Lemond's argument that Chris's death was caused by his intentional participation in an illegal activity. Lemond contends that this Court's opinion in Hinkle v. Railway Express Agency, 242 Ala. 374, 6 So.2d 417 (1942), mandates a directed verdict in its favor. This Court stated in Hinkle that "[a] person cannot maintain a cause of action if, in order to establish it, he must rely in whole or in part on an illegal or immoral act or transaction to which he is a party." 242 Ala. at 378, 6 So.2d at 421.

More recently, in Oden v. Pepsi Cola Bottling Co. of Decatur, Inc., 621 So.2d 953 (Ala. 1993), this Court clarified the meaning of the [sic] that statement from Hinkle. In Oden, this Court held: "We interpret the rule in Hinkle to bar any action seeking damages based on injuries that were a direct result of the injured party's knowing and intentional participation in a crime involving moral

turpitude." 621 So.2d at 955 (emphasis added). A crime involving moral turpitude is one involving conduct with an inherent quality of baseness, vileness, or depravity in regard to the duties one owes to society. Meriwether v. Crown Investment Corp., 289 Ala. 504, 268 So.2d 780 (1972); 58 C.J.S. Moral (1948).

Because Lemond presented no substantial evidence that Chris's actions as a passenger in the automobile driven by Jason involved base, vile, or depraved conduct, we conclude that the trial court correctly denied Lemond's motion for a directed verdict based on this issue.

V.

Lemond argues that the trial court committed reversible error by denying a mistrial based on a statement made by Wheeler's counsel during trial, which Lemond contends was a grossly improper and prejudicial attempt to impeach one of its witnesses. Lemond called Robert Vinson as a witness. Vinson was Lanett's chief of police at the time of Chris's fatal accident and had visited the scene shortly after the accident occurred.

One of the first questions asked by Wheeler's counsel on cross-examination of Vinson was: "And would you tell the jury, Mr. Vinson, when you left the police department on October the 5th of '92 whether you voluntarily left or whether you were fired by the City?" Lemond's counsel objected to the question and moved for a mistrial. After a lengthy discussion with counsel for both parties,

the trial judge harshly reprimanded Wheeler's counsel for asking such a question without having what the judge believed was a sufficient basis to do so. However, he denied Lemond's motion for a mistrial. Instead, the trial judge gave the jury the following instruction:

> "Ladies and gentlemen, the question that was put to the witness was not an appropriate question and there is no basis in fact. I've gone over the matter carefully with the attorneys. There was no basis in fact for a suggestion that Chief Vinson was at any time fired from his job. And I'll ask you to completely put that suggestion out of your minds. It has nothing to do with this case, anyway. So just disabuse yourself of anything about Chief Vinson's job situation."

A judge is vested with wide discretion in determining whether an incident that occurs during trial so affects the right of either party to a fair trial as to require a mistrial. Continental Eagle Corp. v. Mokryzycki, 611 So. 2d 313 (Ala. 1992); General Motors Corp. v. Johnston, 592 So.2d 1054 (Ala. 1992); Valley Building & Supply, Inc. v. Lombus, 590 So.2d 142 (Ala. 1991). Accordingly, "[t]his Court will not reverse a trial court's ruling on a motion for a mistrial unless it is absolutely clear that its discretion has been abused." Wright v. Terry, 646 So.2d 11, 14 (Ala. 1994). Given the curative

instruction the trial judge provided to the jury, we cannot hold that the judge clearly abused his discretion by denying Lemond's motion for a new trial.

VI.

Lemond also argues that the trial court committed reversible error by denying its motion for a directed verdict in its favor based upon Lemond's argument that the efficient intervening or proximate cause of Chris's fatal injury was Jason's operation of the automobile. As this Court has already noted, the standard of review applicable to the denial of a motion for a directed verdict is whether the nonmoving party, in this instance Wheeler, has presented substantial evidence in support of his position. Carr, supra.

A review of the trial record shows that Wheeler did present substantial evidence in support of his claim that Chris's fatal injury was caused by Lemond's conduct relating to the condition of Magnolia Road at the time of the accident.[2] Moreover, it is well

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[2]The plaintiff presented evidence indicating that at the time of the accident fill material had become dislodged from many of the sewer trenches, leaving trenches from two to eight inches deep across the surface of the road, and indicating that the construction area was not marked by any warning signs or lights. The plaintiff also presented testimony indicating that the road surface was

established that the question of proximate cause is almost always a question of fact to be determined by the jury, and that the question must go to the jury if reasonable inferences from the evidence support the plaintiff's evidence. Garner v. Covington County, 624 So.2d 1346 (Ala. 1993); Marshall County v. Uptain, 409 So.2d 423 (Ala. 1981). Accordingly, the trial court properly denied Lemond's motion for a directed verdict based on this issue.

VII.

Lemond argues that the trial court erred in denying its motion for a new trial or, in the alternative, a remittitur of damages, based on what Lemond contends was an excessive verdict. The trial court conducted a hearing in review of the jury's damages award and issued a written order regarding Lemond's motion, consistent with this Court's mandate in Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986), and Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala. 1989).

The trial court denied Lemond's motion for a new trial, holding that "none of the grounds [raised in support of the motion] separately or collectively warrant the grant of this motion." On appeal from a trial court's denial of a motion for new trial, this Court must affirm unless the jury verdict is so contrary to the weight and sufficiency of the evidence, viewed most favorably to the nonmoving party, that it is palpably wrong or manifestly

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unsafe at speeds above 25 miles per hour.

unjust. Interstate Engineering, Inc. v. Burnette, 474 So.2d 624 (Ala. 1985); Empiregas, Inc. v. Wooten, 527 So.2d 1298 (Ala.Civ.App. 1987). After a thorough review of the record, we conclude that the jury's verdict is supported by the evidence presented at trial and that the trial court correctly denied Lemond's motion for a new trial.

Under Alabama law, a jury's verdict is presumed correct and a motion for new trial or remittitur based on alleged excessiveness of a punitive damages award will be denied unless it is determined that the verdict is excessive as a matter of law or is the result of passion, bias, corruption, or other improper motive. Hammond, supra. In the trial court's order regarding Lemond's request for a remittitur, that court discussed the factors established in Hammond and Green Oil Co. and concluded:

> "This Court feels that to order a remittitur here would be to usurp the function of the jury in a case in which this Court has determined that the verdict was in no way affected by bias, passion, prejudice, corruption or other improper motive or conduct. Accordingly, the defendant's motion seeking a remittitur in this case is denied."

Because the amount of damages to be awarded in a wrongful death action is largely within the discretion of the jury, where the trial court denies a new trial

because it does not find the verdict excessive, the presumption of correctness favoring the jury's verdict is strengthened. Deaton, Inc. v. Burroughs, 456 So.2d 771 (Ala. 1984). After an independent review of the Hammond and Green Oil factors in relation to the evidence contained in the record of this trial, we agree with the trial court's holding. Accordingly, we hold that that court did not err in denying Lemond's motion for a remittitur.

VIII.

Finally, Lemond argues that its constitutional rights were violated by the jury's award of punitive damages because, Lemond contends, it did not engage in wanton conduct. Lemond argues generally that Alabama's wrongful death statute, Ala. Code 1975, § 6-5-410, violates several provisions of the Alabama Constitution of 1901 and several Amendments of the United States Constitution because it allows punitive damages to be levied against a party who may be guilty only of negligence and not wanton conduct. Although Lemond's constitutional challenge focuses on § 6-5-410, we note that § 6-5-391 is the statute creating a cause of action for the wrongful death of a minor. Because of the similarities of these statutes, the arguments challenging § 6-5-410 could also apply to § 6-5-391. However, Lemond's argument on this issue lacks the specificity required in order for this Court to address it. Rule 28(a)(5), Ala.R.App.P.; Alabama Power Co. v. Turner,

575 So.2d 551 (Ala. 1991), cert. denied, 500 U. S. 953 (1991).

Lemond argues that the trial court erred in denying its motion for a directed verdict on the issue of wantonness. However, the record contains ample evidence to support a jury determination that Lemond's acts or omissions at issue in this case constituted wanton behavior. For example, in its Hammond order, the trial court noted:

> "In this case there was creditable evidence before the jury, and indeed it was undisputed, that there were no warning signs placed by the defendant on the approach to the construction area in the direction in which the car occupied by the decedent was being driven. There was further creditable evidence before the jury that in the area where sewer construction was ongoing, that at the time of the accident resulting in the death of the decedent there were holes in the road created by the defendant which were from three to eight inches in depth and three feet wide. There was further evidence before the jury that prior to the accident in question, complaints had been made to the defendant's superintendent in charge of construction about the holes in the road in response to which

the superintendent was quoted as saying:

> "I'm tired of the bitching about the road. We're going to take the cheapest way out.'
>
> "One week later the child was killed. Additionally, there was testimony that the manner in which this job was handled was the usual and customary way all [Lemond's] jobs were handed [sic]. The defendant in this case could certainly foresee that the failure to post warning signs and the maintenance of the roadway with large potholes or depressions in it could likely cause serious injury or death to travelers on the roadway. Both under its contract with the City of Lanett and under applicable law the defendant was under a duty to maintain this roadway in a reasonably safe condition and the jury was certainly entitled to consider its failure to do so as culpable and reprehensible conduct on the part of the defendant."

Accordingly, Lemond's argument that it was assessed punitive damages based on only negligent conduct, rather than on wanton conduct, is without merit. The trial court correctly denied Lemond's motion for a directed verdict on the issue of wantonness.

Lemond also argues that it was prejudiced because there was no apportionment of damages among the joint tort-feasors involved in Chris's fatal injury, i.e., Lemond, the City of Lanett, and Jason Colley. Both the city and Jason settled with Wheeler before trial. However, this Court has repeatedly held that the general wrongful death statute, § 6-5-410, does not provide for apportionment of damages among joint tort-feasors. Rose v. Rogers, 632 So.2d 434 (Ala. 1994); Tatum v. Schering Corp., 523 So.2d 1042 (Ala. 1988); Black Belt Wood Co. v. Sessions, 514 So.2d 1249 (Ala. 1987). The same rule of nonapportionment also applies to damages awarded under § 6-5-391, the statute creating a cause of action for the wrongful death of a minor.

IX.

The judgment of the trial court is affirmed.

AFFIRMED.

Almon, Shores, Cook, and Butts, JJ., concur.

Maddox, J., concurs in the result.

Houston, J., dissents.

Hornsby, C. J., and Kennedy and Ingram, JJ., recused.

MADDOX, JUSTICE (concurring in the result).

I concur in the result. This is a wrongful death case, and in such cases this Court has consistently held that only punitive damages can be awarded. A majority of this Court has also consistently held that there can be no apportionment of punitive damages among joint tort-feasors in a wrongful death action. It is also an action that the Legislature has said is not affected by the so-called "tort reform" legislation passed in 1987, dealing with punitive damages. See, Ala. Code 1975, § 6-11-29.[3]

This case also involves claims of contributory negligence on the part of the decedent. This Court has considered contributory negligence on more than one occasion, but the issues regarding it remain the same.

In Killough v. Jahandarfard, 578 So.2d 1041, 1047 (Ala. 1991), concurring in the result, I stated the following

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[3]Section 6-11-29 provides:

> "This article [Article 2, "Punitive Damages"] shall not pertain to or affect any civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, as amended."

I assume this action was filed according to § 6-5-391.

regarding Alabama law in wrongful death cases:

> "I have always been of the opinion that wrongful death cases were in a different category insofar as the amount of punitive damages that could be awarded, but I have not agreed that Alabama's procedures were without Constitutional problems. See my opinion concurring in part and dissenting in part in Industrial Chemical & Fiberglass Corp. v. Chandler, 547 So.2d 812, 833 (Ala. 1988). My opinion in Industrial Chemical was based primarily upon a statement made by the Supreme Court of the United States in Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 47 S. Ct. 509, 71 L. Ed. 952 (1927): 'We cannot say that it is beyond the power of the legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive.' 274 U.S. at 116."

578 So.2d at 1048.

When the Legislature considered major "tort reform" legislation in 1987, it elected not to change the law of Alabama in wrongful death actions, such as this one, not involving a health care

provider.[4] The Legislature has elected not to change the law that only punitive damages can be awarded in wrongful death actions. Neither has the Legislature seen fit to change the law of Alabama regarding the nonapportionment of punitive damages among joint tort-feasors, although certain members of this Court have believed that this Court should take such action. See, Tatum v. Schering Corp., 523 So.2d 1042 (Ala. 1988) (Jones and Houston, JJ., dissenting).

The majority suggests that Lemond's constitutional claims lack specificity because they were not adequately briefed. I cannot find such a deficiency in the appellant's brief, and although the argument on those claims takes only three pages of the appellant's brief, it is succinct, it is cogent, and it sufficiently raises and addresses the appellant's constitutional claims. I set out the appellant's argument on those claims in full to show the basis for my independent conclusion on the question whether the constitutional claims were adequately argued:

> "VII. DEFENDANTS SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS, AS WELL AS OTHER CONSTITUTIONAL RIGHTS, WERE

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[4]Legislation setting a cap on punitive damages in wrongful death cases involving health care providers was recently declared unconstitutional in Smith v. Schulte, [Ms. 1930362 and 1930459, August 18, 1995] ___ So.2d ___ (Ala. 1995).

VIOLATED BY THE IMPOSITION OF A $3,500,000 PUNITIVE DAMAGES VERDICT FOR SIMPLE NEGLIGENCE WITHOUT APPORTIONMENT BASED ON DEGREE OF CULPABILITY AND WITHOUT ADEQUATE STANDARDS FOR REVIEW.

"The award of punitive damages to the plaintiff in this case is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6, of the Constitution of the State of Alabama. The imposition of punitive damages against Lemond based on the unbridled whim of the jury violates Article I, Sections 15 and 22, of the Alabama Constitution and the equal protection clause of the Fourteenth Amendment of the United States Constitution. The imposition of punitive damages against Lemond which are in the nature of a civil fine and punishment by requiring a burden of proof upon the plaintiff which is less than the burden of proof required in a criminal case is unconstitutional. The lack of sufficient standards by which the juries in Alabama, are allowed to be instructed as to the assessment of punitive damages violates the due process clause of the Fourteenth Amendment of the United States Constitution and Article I,

Section 6, of the Alabama Constitution (1901). Such was the case in this trial. Further, the trial court's failure to adequately consider the factors detailed in Hammond v. City of Gadsden, [493 So.2d 1374 (Ala. 1986)], and Green Oil Co. v. Hornsby, [539 So.2d 219 (Ala. 1989)], and as discussed in this brief, in its post-verdict review denied Lemond of proper constitutional protection in the present case.

"The submission to the jury for the assessment of punitive damages based upon Lemond's simple negligence is in violation of the Fifth, Eighth, and Fourteenth Amendments of the Constitution of the United States of America. No other state or federal court system allows punitive damages for simple negligence. Lemond did not engage in any wanton conduct. The trial court erred in failing to grant Lemond's motion for directed verdict on the plaintiff's wantonness claim. There is no rational basis for the disparate treatment in Alabama. Alabama's wrongful death statute, [Ala Code 1975,] Section 6-5-410 does not provide for the assessment of said punitive damages but rather is a result of improper and incorrect judicial interpretation. Tatum v.

Schering Corp., 523 So.2d 1042 (Ala. 1988), dissenting opinion of Justice Houston, Rose v. Rogers, 632 So.2d 434 (Ala. 1993), dissenting opinion of Justice Houston. The Court is urged to reexamine this issue in view of the results of this case.

"In the matter at hand settlements had been reached with the co-defendant City in the amount of [$75,000] and potential co-defendant Colley in the amount of [$25,000]. Under the existing law of Alabama, the trial court instructed that,

> "'For a wrongful death there can be only one recovery. That is, you will determine the amount of damages that can be awarded for the death of Chris Wheeler, if any. And, of course, I have already explained to you that the plaintiff would be entitled to recover only if they meet their burden of proof and prove negligence or wantonness and prove that it was a cause [of] death. But, if assuming that they prove that, then you will arrive at an

> amount based on rules of damages that I've given you. From that amount, [$100,000] will be subtracted.' (R. 1482-1483.)

"As pointed out by Justice Houston and Justice Jones in their dissenting opinion in Tatum v. Schering, supra, and Justice Houston again in Rose v. Rogers, supra, the lack of apportionment among joint tort-feasors in accordance with each defendant's culpability is unfair and unjust. The Court's instructions and the effect of the settlements unfairly violated Lemond's rights to due process by allowing imposition of punitive damages upon Lemond for actions of others.

"The notions of 'fundamental fairness' inherent in the concept of due process have been violated by this punitive damages award. The Supreme Court of the United States has recognized that

> "'We need not, indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.

> We can say, however, that a general concern of reasonableness ... properly enters into the constitutional calculus.'

"Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18, 111 S.Ct. 1032, 1043, 113 L.Ed.2d 1 (1991). Clearly, this verdict is so 'grossly excessive' as to violate the substantive component of the due process clause.

"Punitive damages 'should not exceed an amount that will accomplish society's goal of punishment and deterrence' in wrongful death cases. General Motors Corp. v. Johnston, 592 So.2d 1054, 1063 (Ala. 1992); Green Oil Co. v. Hornsby, 539 So.2d 218, 222 (Ala. 1989). 'Damages are considered excessive if they shock the judicial conscience of the court.' Land & Associates, Inc. v. Simmons, 562 So.2d 140, 150 (Ala. 1989). This excessive verdict violates Lemond's constitutional guarantees and is due to be set aside.

"CONCLUSION

"The blame for this otherwise inexplicable $3,500,000 verdict rests primarily on:

"(1) The illegal closing argument demanding $7,000,000 in punitive damages for Lemond's breaches of contracts all over the state. This results from the trial court's reversibly erroneous admission of a non-party's expert's opinion that Lemond breached the construction contract with the City of Lanett in spite of the fact that it was undisputed by the parties that Lemond complied with the contract and there was no breach. The contract was not [ambiguous] and the intent of the parties thereto was never in dispute; and

"(2) The trial court's refusal to allow the jury the opportunity to find Wheeler personally responsible for his own negligent conduct when a directed verdict was erroneously and reversibly granted on the defense of contributory negligence.

"The trial court further erred by refusing to grant a directed verdict or judgment for Lemond. As a matter of law, the proximate cause and/or efficient intervening cause of this off-the-road collision was not any supposed breach of duty by Lemond, but rather the reckless and/or criminal conduct of Wheeler and his colleague Colley: At 3:00 a.m., these

underage teens wrongfully took a Mercury Marquis without permission, license, or ability to safely operate it, and proceeded to evade arrest by speeding 70 miles per hour through a residential area while running stop signs, dodging construction cones, accelerating across a highway without looking, going airborne over railroad tracks, and ignoring the blue flashing light and siren.

"The trial court further failed to grant a mistrial, which it acknowledged was due to be granted when Lemond's primary witness was intentionally, falsely, and 'poisonously' impeached without any basis in law or fact.

"When it is apparent that there has been a miscarriage of justice, the trial judge is under a duty to set aside the verdict. The trial judge stated near the end of the case, '[N]othing ought to come out of this case other than a defendant's verdict,' (R. 1187) and 'in a world that's totally free of influences of various kinds, I would probably grant a directed verdict. But I think its [sic] better to let it go on and let the thing go. I don't think I ought to grant a directed verdict because its

> [sic] just not judicially economical to do that.' (R. 702) The truly excessive sum further evidences the gross miscarriage of justice requiring reversal and rendering of judgment for Lemond, or in the alternative a new trial or remittitur should be ordered."

Appellant's brief, pp. 75-79.

As I read this argument, the appellant is pleading with this Court for justice and is asking this Court to re-examine much of its prior law relating to the award of punitive damages for simple negligence and to the question whether there should be apportionment of damages among joint tort-feasors. The appellant also argues that Alabama is out of step with other states in its application of the rebuttable-presumption rule regarding contributory negligence of minors.

In the past, this Court has been requested on more than one occasion to fashion a different rule of law in cases such as this. This Court has been unwilling to change the law. The Legislature likewise has not elected to change the law.

If this Court desired to address those questions that it has been unwilling to address in the past, I would note that this case contains them all: an award of punitive damages for simple negligence, nonapportionment of damages against joint tort-feasors, contributory negligence and whether it should be considered in an

award of damages, and last, but not least, question of excessiveness of the verdict, especially against this particular tort-feasor in view of the fact that there are joint tort-feasors and there was a serious argument that the decedent was contributorily negligent and had assumed the risk.

Based on the foregoing, and in view of the present state of the law in Alabama relating to punitive damages in wrongful death cases, I agree that the trial judge did not err, but I concur only in the result.

Lemond Construction Company v. Wheeler

HOUSTON, JUSTICE (dissenting).

I.

Although this case is not a contract action, the determination of whether Lemond complied with the requirements of the construction contract in question is essential to the outcome of the present case. This Court has set out the proper standard to be applied in assessing a contractor's liability for negligence in performing work on construction contracts. In McFadden v. Ten-T Corp., 529 So. 2d 192 (Ala. 1988), this Court agreed with the following statement from Hunt v. Blasius, 74 Ill.2d 203, 209, 23 Ill. Dec. 574, 384 N.E.2d 368, 371 (1979):

> "'An independent contractor owes no duty to third persons to judge the

> plans, specifications or instructions which he has merely contracted to follow. If the contractor carefully carries out the specifications provided him, he is justified in relying upon the adequacy of the specifications unless they are so obviously dangerous that no competent contractor would follow them. (Restatement (Second) of Torts sec. 404, Comment a (1965))....'"

McFadden, 529 So. 2d at 200 (emphasis added; citations omitted). The Illinois Supreme Court in Hunt v. Blasius cited and quoted from the landmark case of Ryan v. Feeney & Sheehan Building Co., 239 N.Y. 43, 46, 145 N.E. 321, 321-22 (1924). The plaintiff's most damning line of attack in the present case was to argue that the trenches in question were improperly filled in.[5] The plaintiff's counsel argued that the trenches should have been covered with "bituminous" temporary pavement.

The first task for this Court is to determine what the "contract" is. Then we

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[5]Because the undisputed evidence shows that the automobile in which Christopher was riding had run five stop signs, crossed a four-lane highway, and crossed a railroad track without stopping or slowing down, all in an attempt to outrun the police, I question whether Lemond's failure to erect signs or flashing lights at the construction site was a proximate cause of Christopher's death; however, that may be for the trier of fact.

must determine whether the "contract" required that the trenches in question be covered with temporary asphalt at the time of the accident. The plaintiff argued -- and the majority has accepted this argument -- that the engineering specifications, written by Engineering Service Associates ("ESA") for the City of Lanett for its entire West Shawmut area sewer improvement plan, of which the defendant Lemond Construction Company contracted only to do a small part, should be considered as the "contract." Even if this position is correct, the plaintiff presented no substantial evidence that the contract required the use of temporary asphalt. Section 2500-4(A)(8)(a), which deals with the repair of streets in connection with the installation of sewer lines, clearly states: "Where pipe trenches are cut across ... existing street ... pavement ..., they shall be backfilled ... and traffic restored as quickly as possible by the construction of a temporary surface of crushed stone or bituminous material, as applicable." (Emphasis added.) The plaintiff points to § 2501-3(G)(2), which concerns traffic restoration, to buttress his argument that the contract required that temporary asphalt be used to cover the trenches. That section states that the contractor "shall either install a temporary bituminous pavement or the binder course, and maintain the temporary surface under traffic for at least 30 days" before to [sic] putting down permanent asphalt. (Emphasis added.)

The trial court ruled that the "contract" was ambiguous. "If the

language of a contract is ambiguous or uncertain, the surrounding circumstances, including the construction placed on the language by the parties, are taken into consideration so as to carry out the intention of the parties." Walls v. Bank of Prattville, 575 So. 2d 1081, 1083 (Ala. 1991) (citing City of Montgomery v. Maull, 344 So. 2d 492 (Ala. 1977) (emphasis added)). Furthermore, "the ambiguities should be interpreted against the party drawing the contract if the circumstances surrounding the contract do not make the terms clear." United States Fidelity & Guaranty Corp. v. Elba Wood Products, Inc., 337 So. 2d 1305, 1308 (Ala. 1976).

There is uncontradicted evidence that the City of Lanett had always used crushed stone as temporary fill in prior similar sewer installations. There is also uncontradicted testimony that there was a mutual implied "understanding" that Lemond would use crushed stone.[6] The evidence also showed that the use of crushed stone was much more economical and that its use had been figured into the bid given by Lemond. The plaintiff put on no testimony contradicting the evidence of this implicit understanding. Mr. Darrell Brown, ESA's construction inspector, testified that the specifications allowed the use of crushed stone as a temporary filler, without any top coat of temporary

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[6]"[W]here the parties place a construction upon the contract, the court will follow it." Merchants National Bank of Mobile v. Hubbard, 220 Ala. 372, 125 So. 335, 337 (1929).

asphalt. From the evidence of the custom, the course of dealings, and the other circumstances, including the regular inspection of the site by city officials and ESA's construction inspector without complaint,[7] the trier of fact could only have resolved any ambiguity as to the use of temporary asphalt in favor of Lemond. This is especially true in light of the requirement of Elba Wood Products, supra, that ambiguities be construed against the drafter. Because the specifications of this contract were drawn up for the city by ESA, a trier of fact would be required to construe the provisions in question in favor of Lemond.

"A jury is not free to ignore the undisputed testimony of unimpeached witnesses and substitute its owns conclusions for that testimony." AmSouth Bank, N.A. v. Martin, 559 So. 2d 1058, 1065 (Ala. 1990) (citing Stinson v. Acme Propane Gas Co., 391 So. 2d 659, 661 (Ala. 1980)). Because the plaintiff presented no evidence contradicting Lemond's evidence as to the underlying circumstances, the course of dealing, and the underlying implicit understanding, the jury was bound to construe the ambiguity in favor of Lemond; therefore, the jury was required to read the contract as

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[7]"[T]here is no surer way to find out what the parties meant than to see what they have done." Southern Bitulithic Co. v. Hughston, 177 Ala. 559, 566, 58 So. 450, 452 (1912) (quoting Brooklyn Life Ins. Co. v. Dutcher, 95 U.S. 269, 273, 24 L.Ed. 410, 412 (1877)).

allowing the use of crushed stone without temporary asphalt.

The plaintiff's only evidence tending to show that the contract required the use of temporary asphalt was the improper opinion evidence of his expert Dr. James H. Deatherage. Dr. Deatherage, who currently teaches civil engineering at the University of Tennessee, has a Ph.D. in civil engineering. As the majority correctly points out, "[e]xpert testimony [as to the interpretation of construction contracts] is admissible where technical or trade terms and expressions in a contract are peculiar to a specialized discipline and are not of common knowledge." ___ So.2d at ___. The trial court correctly allowed Dr. Deatherage to testify as to the meaning of the term "binder course" as that term is used in § 2501-3(G)(2), so as to create a conflict with § 2500-4(A)(8)(a) and therefore establish ambiguity. Such testimony, though, is not evidence as to how the ambiguity should be construed.

After asking Deatherage about the meaning of the term "binder course," the plaintiff's attorney asked him, "In your judgment, was asphalt placed across these ditches here pursuant to the terms and conditions of that contract?" (Emphasis added.) Deatherage answered, "No, not at all." The trial court erred in overruling the defendant's objection and in not striking the answer and instructing the jury to disregard it as an improper opinion. "Expert testimony cannot be received to prove to a court or jury what the proper or legal construction of any

instrument or writing is." Della Ratta, Inc. v. American Better Community Developers, 380 A.2d 627, 635 (Md. Ct. Spec. App. 1977) (quoting 31 Am.Jur. 2d, Expert and Opinion Evidence § 171, p. 736 (1967)). When Deatherage went beyond explaining technical terms and gave an opinion not only construing the contract but also improperly concluding that Lemond had breached the contract, he was no longer "assisting the trier of fact."[8] In Kennedy Elec. Co. v. Moore-Handley, Inc., 437 So. 2d 76 (Ala. 1983), this Court upheld the exclusion of expert testimony "which interpreted the contract for [the jurors]." The Court held: "It was for the jury to decide the meaning of the contract, and if the trial court excluded opinions that would have invaded the province of the jury in that regard, such action was entirely correct." Id. at 82 (citing Alabama Power Co. v. Williams, 222 Ala. 75, 130 So. 788 (1930)).

In light of the strong emphasis that the plaintiff's attorney placed in his closing statement on the improper opinion testimony and on the plaintiff's totally

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[8]"A witness, be he expert or lay, cannot give his opinion when such constitutes a legal conclusion or the application of a legal definition. ... This rule is justified upon the ground that to allow such would be invading the province of the jury by giving an opinion upon an ultimate issue in the case." Charles W. Gamble, McElroy's Alabama Evidence § 128.07 (4th ed. 1991). (Emphasis added.)

unsubstantiated contention that the "contract" required the use of temporary asphalt, the trial court's improper admission of Dr. Deatherage's opinion testimony, over objection, requires reversal. Furthermore, the trial court's allowing, over objection, the following statement by the plaintiff's counsel during the plaintiff's rebuttal during closing arguments also mandates reversal:

> "As I recall, Mr. Lemond ... said from the witness stand, 'No, I knew before I bid that we were going to use the crush and run [crushed stone] because I called.' I suggest to you [that] the other bidders bid it on the basis of the contract, and that's why he was low. [Objection overruled.] And he was low. He knew they were going to use the crush and run. And he uses it in every job.... It is apparent, it is apparent that they do it all over the State in every job. You want that to continue? <u>You want them to live by the terms and conditions of the contract?</u>. . . . You have the power. You can put a stop to it. A million dollars won't stop it."

(Emphasis added.) There was no substantial evidence that Lemond had any contractual obligation to use temporary asphalt. The magnitude of the damages award clearly demonstrates that the jurors had their reasoning poisoned by the improperly admitted opinion evidence, the

effect of which was magnified by the arguments made by plaintiff's counsel in seeking punitive damages.

II.

"There is no room on the highways for multiple standards of conduct." Gunnells v. Dethrage, 366 So. 2d 1104, 1106 (Ala. 1979). "The overwhelming majority of jurisdictions hold minors to an adult standard in determining whether their conduct while engaging in an adult activity is negligent." Id. at 1105 (citing Robinson v. Lindsay, 20 Wash. App. 207, 579 P. 2d 398 (1978), aff'd, 92 Wash.2d 410, 598 P. 2d 392 (1979)); Prosser, Law of Torts, § 32, pp. 156-57 (4th ed. 1971); Annot., 97 A.L.R.2d 872 (1964)). On the early morning of June 6, 1992, Christopher Wheeler, age 13, started a chain of events that led to his own tragic death. It is undisputed that Christopher woke up his 15-year-old friend Jason Colley at 3:30 in the morning and convinced him to take Jason's parents' car out for a ride. Christopher knew that Jason was unlicensed and undoubtedly knew of the dangers of driving. When officers in a patrol car attempted to pull the boys over, Christopher, again according to uncontradicted testimony, encouraged Jason to run from the police. According to Jason's own testimony, Christopher "asked me to speed up a lot but never asked me to slow down." The question before this Court is: What standard of care should be applied to persons such as Christopher who endanger themselves and others?

Christopher instigated and encouraged illegal and wanton conduct. It is only by the grace of God that other persons, including his friend Jason, were not likewise killed or maimed. This Court in Gunnells, 366 So. 2d at 1066, squarely held that there is only one standard of care to be applied to all persons using the highways of this State. If Christopher had been driving, no one would argue that any special reduced standard of care should have been applied to him What is the difference here? Can the members of this Court honestly believe that Christopher is any less responsible for the reckless acts of June 6, 1992, or that his conduct is any less a threat to Alabama's motorists?[9] Christopher was just as much involved in an adult activity

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[9]One can make a strong argument that Jason's contributory negligence is imputable to Christopher, regardless of whether this Court decides to hold Christopher to an adult standard of care. See § 491, Restatement (Second) of Torts (1965):

> "Any one of several persons engaged in a joint enterprise ... is barred from recovering against ... other persons by the negligence of any member of the group."

See also McIsaac v. Monte Carlo Club, Inc, 587 So. 2d 320, 326 (Ala. 1991) (Houston, J., concurring in part and dissenting in part and arguing for the application of "the doctrine of complicity").

as Jason was, and the same public policy concerns that would mandate holding Jason to an adult standard apply equally to Christopher.

In 1991, the most recent year for which the Alabama Department of Economic and Community Affairs has published figures, there were 112,854 reported automobile accidents, 41,660 reported injuries, and 1,110 reported deaths on Alabama's highways. Alabama County Data Book 1991-92 p. 46 (Alabama Department of Economic and Community Affairs, 1992). Is this Court prepared to explain to the families of persons killed in the future, because of similar reckless conduct on the part of minors such as Christopher illegally using our State's highways, why instigating the illegal taking of an automobile and inciting highly dangerous hot pursuits should not be deterred to the fullest extent possible?

I would reverse the judgment and remand the case, because I would hold that the trial court erroneously directed a verdict on the issue of contributory negligence and, consequently, erroneously failed to charge the jury as to contributory negligence. As this Court held in Gunnells, 366 So. 2d at 1106, "[i]n determining whether a minor has knowledge of the circumstances and the probable consequences of his acts or omissions on the highways, he must be held to the same standard as all other users of the highways." (Emphasis added.)

TRIAL COURT'S ORDER DENYING
MOTION FOR NEW TRIAL

RECEIVED
MAR [ ] 1994

IN THE CIRCUIT COURT OF CHAMBERS
COUNTY, ALABAMA

| | | |
|---|---|---|
| RICHARD C. WHEELER, as Administrator of the Estate of Christopher Wheeler, | ) | |
| Plaintiff, | ) | |
| VS. | ) | CASE NO. CV-92-145 |
| LEMOND CONSTRUCTION COMPANY, | ) | |
| Defendant. | ) | |

ORDER ON MOTION FOR NEW TRIAL,

AND IN THE ALTERNATIVE,
A MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND IN THE ALTERNATIVE, REQUEST FOR REMITTITUR OF THE VERDICT AND DAMAGES ON BEHALF OF LEMOND CONTRACTING, INC.

The above styled motion of the defendant, Lemond Construction Company, having come on for hearing before the Court and the Court having heard extensive argument of Counsel on behalf of the proponent, such argument and the Court's views with regard thereto having been taken stenographically by the court reporter of this Court, such proceedings are adopted as a part of this order and will be made a part of the record on any appeal in this proceeding.

Considering first the motion of the defendant, Lemond Construction Company, for a J.N.O.V., it is the considered judgment of this court that the plaintiff in this case has presented substantial evidence supporting each element of his causes of action requiring resolution of the factual disputes by the jury. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). Accordingly, this defendant's motion for J.N.O.V. is due to be and hereby is denied.

With regard to this defendant's motion for a new trial, the Court has carefully considered each ground of such motion and has expressed, as previously noted, its views as to such grounds for such motion and has concluded that none of such grounds separately or collectively warrant the grant of this motion.

This Court observed the jurors throughout this proceeding. They appeared to be attentive to the evidence as it was presented, the arguments of respective counsel for the parties and the charge of the Court on the applicable law. The Court is of the further opinion that anything untoward which might have occurred during the trial was fairly and adequately covered by the Court at the time of its occurrence and did not improperly influence the jury in any way. The jurors who sat in this case were good and reliable individuals representing a broad cross section of the citizens of Chambers County, Alabama. They appeared to discharge their duties in a thoroughly

conscientious manner. The Court has searched its memory and can find nothing which would suggest that the jury in this case acted improperly or that the verdict in this case was based upon bias, prejudice, sympathy, favoritism or other improper motive or conduct, but rather that on the other hand after extended deliberations, the jury in this case reached a reasoned decision based solely upon the evidence and the law as given to them by the Court. Accordingly defendant's motion for a new trial is due to be and the same is hereby denied.

With regard to the defendant's request for a remittitur, this court is bound to follow the directions of our Supreme Court outlined in Green Oil v. Hornsby, 539 So. 2d 219 (Ala. 1989) and Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986)

In the fairly recent case of General Motors Corp. v. Johnston, 592 So. 2d 1054 (Ala. 1992) our Supreme Court reiterated:

> The right to a trial by jury is a fundamental constitutionally guaranteed right, Art. I, Sec. 11, Const. of 1901, and therefore a jury verdict may not be set aside unless the verdict is flawed, thereby losing its protection.

Hammond, 493 So. 2d at 1378.

With regard to damages, a jury verdict may be flawed in two ways.

"First, it may include or exclude a sum which is clearly recoverable or not as a matter of law, or which is totally unsupported by the evidence where there is an exact standard or rule of law that makes the damages legally and mathematically ascertainable at a precise figure. . . . Second, a jury verdict may be flawed because it results, not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motive."

Hammond, 493 So. 2d at 1378. The presumption of correctness of a jury verdict can be overcome only by a clear showing that the amount of the

> award is excessive. Green Oil Co., 539 So. 2d 218 (emphasis added). "It is well understood that in considering the adequacy or excessiveness of a verdict, each case must be determined on its own facts, and that neither the trial court, nor this Court, may substitute its judgment for that of the jury." Green Oil Co., 539 So. 2d at 222, citing City Bank of Alabama v. Eskridge, 521 So. 2d 931 (Ala. 1988); Hammond, 493 So. 2d 1374.

The factors mentioned by the Appellate Court in Hammond include:

1. The culpability of the defendant's conduct.

2. The desirability of discouraging others from similar conduct.

3. The impact upon the parties.

4. The impact on innocent third parties.

The further factors set forth in Green Oil include:

5. Punitive damages should bear a reasonable relationship to the harm that is likely to occur as well as the harm that actually has occurred.

6. The degree of reprehensibility of the defendant's conduct.

7. Was the wrongful conduct profitable to the defendant.

8. The financial position of the defendant.

9. All costs of litigation should be included.

10. Any criminal sanctions imposed upon the defendant.

11. Any other civil actions against the defendant based upon the same misconduct.

Factors 1, 5 and 6 above appear to this Court as being somewhat intertwined. This is a suit for the wrongful death of a 13 year old child. While this Court, as has been expressed, might well have reached a different conclusion on some of the factual issues involved, it is not the function of this Court to substitute its judgment on such matters for that of the jury, nor is it the function of this Court to substitute its judgment as to what the

law might ought to be for that which it is.

In this case there was creditable evidence before the jury, and indeed it was undisputed, that there were no warning signs placed by the defendant on the approach to the construction area in the direction in which the car occupied by the decedent was being driven. There was further creditable evidence before the jury that in the area where sewer construction was ongoing, that at the time of the accident resulting in the death of the decedent there were holes in the road created by the defendant which were from three to eight inches in depth and three feet in width. There was further evidence before the jury that prior to the accident in question, complaints had been made to the defendant's superintendent in charge of construction about the holes in the road in response to which the superintendent was quoted as saying:

> "I'm tired of this bitching about the road. We're going to take the cheapest way out."

One week later the child was killed. Additionally, there was testimony that the manner in which this job was handled was the usual and customary way all their jobs were handled. The defendant in this case could certainly foresee that the failure to post warning signs and the maintenance

of the roadway with large potholes or depressions in it could likely cause serious injury or death to travelers on the roadway. Both under its contract with the City of Lanett and under applicable law the defendant was under a duty to maintain this roadway in a reasonably safe condition and the jury was certainly entitled to consider its failure to do so as culpable and reprehensible conduct on the part of the defendant.

With regard to 2. above it is obvious that other contractors engaged in working in public thoroughfares need to be discouraged from creating dangerous conditions in the public ways, particularly with no warnings of such conditions.

At the hearing on this motion defendant's counsel, though somewhat reluctantly, admitted that the defendant was fully covered for the damages assessed by public liability insurance. In view of that fact, factors 3 and 8 would seem of little, if any, significance.

This Court is unaware of any impact which the damage award in this case is likely to have upon innocent third parties.

The jury in this case was entitled to conclude from the evidence before it that the manner in which the construction was carried out in this case was designed to profit the defendant over and above what profit it would have normally received had

it properly performed its obligations under its contract and under its duties to the public.

Insofar as this Court is aware, there have been no criminal sanctions imposed upon the defendant nor are there any other civil suits pending or disposed of against this defendant based upon the same misconduct.

This was a hard fought case by the attorneys on both sides and involved a substantial number of depositions as well as expert testimony. The case was partially tried once before; however, on the occasion a mistrial was declared due to the failure of some jurors to properly respond to questions asked upon voir dire.

One other factor which the Court has taken into consideration in considering a remittitur in this case is what punitive damage awards in death actions have been sustained in other cases in this state. As our Supreme Court noted in General Motors Corp. v. Johnston, supra, other punitive damage awards in wrongful death cases have ranged from $2.75 million in Clardy v. Sanders, 551 So. 2d 1057 (Ala. 1989) to $7.5 million in the General Motors case. The punitive award in the instant case ($3.5 million) is the same amount awarded in the case of Black Belt Wood Co. v. Sessions, 514 So. 2d 1249 (Ala. 1986) which our Supreme Court determined not to be excessive. This Court feels that to order a remittitur here would be to usurp the function of the

jury in a case in which this Court has determined that the verdict was in no way affected by bias, passion, prejudice, corruption or other improper motive or conduct. Accordingly, the defendant's motion seeking a remittitur in this case is denied.

This 28 day of February, 1994.

/S/
CIRCUIT JUDGE
FILED IN OFFICE THIS
MAR 3 1994
PHYLLIS CUMBEE, CLERK
CIRCUIT COURT
CHAMBERS COUNTY, ALABAMA

TRIAL COURT'S RULING DENYING
CONSTITUTIONAL DEFENSES

[1603]
PROCEEDINGS

(August 30, 1993)

THE COURT: Okay. The plaintiff has filed an amended answer presenting a number of defenses, most of them technical in nature. They raise the point that punitive damages are unconstitutional.

I think that the point is well taken, but that's beside the point. That has been decided adversely on several occasions by the Supreme Court of Alabama and by the Supreme Court of the United States.

The time will come when they will reverse all of that, because the idea of damages of this nature to punish without benefits provided by the criminal corrections system is ludicrous. But that's not my prerogative. My prerogative is to follow the law as it has been announced in the precedence.

So what I am doing is ruling for the record on each of the defenses presented. And, to the extent that they raise constitutional issues either under the [1604] State Constitution or the Federal Constitution as to the awarding of punitive damages or to the trial rights such as the right against self-incrimination, et cetera, any constitutional issues that are raised, I am ruling on these issues adversely to the defendant. I am ruling on -- that's the first defense, the second defense, third

defense, fourth defense, fifth defense, sixth defense, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, each one of those defenses separately and severally, I am holding as a matter of law that they are not defenses.

Is that sufficient adverse ruling on that?

MR. SHARP: Sufficient, sir.

* * * *

AMENDED ANSWER (EXCERPT)

IN THE CIRCUIT COURT OF
CHAMBERS COUNTY, ALABAMA

| | | |
|---|---|---|
| RICHARD C. WHEELER, AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER GENE WHEELER, | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO.: CV 92-145 |
| THE CITY OF LANETT AND LEMOND CONSTRUCTION COMPANY, et al., | ) | |
| Defendant. | ) | |

AMENDED ANSWER

Comes now the defendant, Lemond Construction Company, and amends its Answer as follows:

FIRST DEFENSE

The plaintiffs' claims for recovery of some or all of the relief prayed for in the Complaint and Amended Complaint are in contravention of the defendant's rights under each of the following constitutional provisions:

(a) The contracts clause of Article I, Section 10, of the United States Constitution;

(b) The excessive fines clause of the Eighth Amendment to the United States Constitution;

(c) The due process clause of the Fourteenth Amendment to the United States Constitution;

(d) The contracts clause of Article I, Section 2, of the Constitution of Alabama;

(e) The excessive fines clause of Article I, Section 15, of the Constitution of Alabama; and

(f) The due process clause of Article I, Section 6, of the Constitution of Alabama.

* * * *

# MOTION FOR NEW TRIAL OR JUDGMENT NOTWITHSTANDING THE VERDICT (EXCERPT)

IN THE CIRCUIT COURT OF
CHAMBERS COUNTY, ALABAMA

| | | |
|---|---|---|
| RICHARD C. WHEELER, AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER GENE WHEELER, | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO.: CV 92-145 |
| THE CITY OF LANETT AND LEMOND CONSTRUCTION COMPANY, et al., | ) | |
| Defendant. | ) | |

MOTION FOR NEW TRIAL, AND IN THE ALTERNATIVE, A MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND IN THE ALTERNATIVE, REQUEST FOR REMITTITUR OF THE VERDICT AND DAMAGES, ON BEHALF OF LEMOND CONTRACTING, INC.

---

The defendant, moves this Honorable Court for relief from the improper and erroneous verdict entered in the above styled case, by requesting a judgment notwithstanding the verdict, and/or a new trial, and, in the alternative, request [sic] this Honorable Court to order an appropriate and necessary remittitur of the verdict and damages in this action. In support of said motions, and as grounds therefore, states as follows:

* * * *

68. The award of punitive damages to the plaintiff in this case is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and Article I Section 6 of the Constitution of the State of Alabama.

69. The award of punitive damages to the plaintiff in this case is violative of the Sixth Amendment to the Constitution of the United States in that punitive damages are penal in nature and, consequently, this defendant is entitled to the same procedural safeguards accorded to criminal defendants, which have not been afforded to defendant in this action.

. . . .

77. The trial court erred in submitting punitive damages to the jury. The Alabama Code §6-5-410 (1975) provides as follows:

> (a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama. . . .

Said act does not provide for the assessment of punitive damages. Alabama is the only known jurisdiction where punitive damages are allowed for simple negligence. Black Belt Wood Company v.. Sessions, 514 So. 1249 (1986). The impositions of punitive damages for simple negligence is in violation of the Fifth,

Eighth, and Fourteenth Amendments of the Constitution of the United States of America.

* * * *

# JURY INSTRUCTIONS (EXCERPT)

[1459]

. . . .

Okay. What is this case about? The plaintiff is suing in this case for the death of Chris Wheeler. In Alabama that's known as an action for wrongful death. There are two bases on which the plaintiff sues. The plaintiff says that the defendant was guilty of negligence and in general says that there were no signs or warning devices out there, and further that the road was in such a condition that it was the cause of the accident in this case.

Secondly, the plaintiff says that the defendant was [1460] guilty of wantonness. Those are the two theories. So you've got to understand negligence and wantonness in order to understand. And I'll be telling you more about negligence and wantonness as I proceed through here. I'll be talking with you as I'm talking now for awhile, and then I'm going to be reading to you some additional charges which are correct charges of the law.

The difference between negligence and wantonness in a general sense is the degree of culpability. There's more fault when somebody is wanton than when they are negligent. And I will explain that to you. But this being a wrongful death case, under the law of Alabama the only type of damages that are recoverable in a wrongful death case are punitive damages. That is damages to punish. And, again, I'll be giving you a more detailed instruction on that a little bit later. So, to all intents and purposes, if there's a recovery for negligence, you will award punitive

damages only. And, if there's a recovery for wantonness, you would award punitive damages only. And so the only real difference between negligence and wantonness in a case such as the present one would be that the more fault there is, the more -- if there's more culpability, then possibly there should be more damages than if there's less culpability. But all of that will be matters for you to weigh in your sound discretion.

* * * *

[1468] Negligence is the failure to discharge or perform a legal duty owed to the other party. Negligence means the failure to exercise reasonable care. That is such care as a reasonably prudent person would have exercised under the same or similar circumstances. Therefore, negligence is the failure to do what a reasonably prudent person would have done under the same or similar circumstances or the doing of something which a reasonably prudent person would not have done under the same or similar circumstances.

* * * *

[1479] Okay. As I've explained to you earlier, the only damages that may be recovered in this case are punitive damages. Under the law, there are two kinds of damages. There are what are known as compensatory damages which are damages given in order to make the defendant whole -- or make the plaintiff whole, and that applies in some civil cases. And you may have heard the term, and I use it here only for the purpose of excluding it from your consideration. The damages in this case are wholly punitive damages. That is damages to punish for

the wrongful death. And it has nothing to do with compensatory damages under the circumstances of this case.

The purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future.

The imposition of punitive damages is entirely discretionary with the jury. Should you award punitive damages in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence in the case and the necessity of preventing similar wrongs.

I told you earlier that there was a little practical difference between negligence and wantonness except insofar [1480] as the question of damages is concerned. Wantonness would be a greater degree of wrong in the case than negligence. And, if you determine that there was wantonness in the case, you could take that into account in assessing the amount of damages in the case.

For a plaintiff to be entitled to recover punitive damages, the plaintiff must prove by clear and convincing evidence that the defendant negligently caused the death of Chris Wheeler or consciously or deliberately engaged in wantonness with regard to Chris Wheeler so that he was caused to die.

Clear and convincing evidence means evidence that when weighed against evidence in opposition were produced in

the mind of the trier of fact affirmed conviction as to each essential element of the claim and a high probability as to the correctness of the result.

Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence but less than beyond a reasonable doubt. You will remember that -- and I'm sure you've heard before that beyond a reasonable doubt is a standard that's applied in criminal cases. So you don't have to prove -- the plaintiff does not have to prove its case beyond a reasonable doubt. But it has to show that it was by clear and convincing evidence that it is likely that the [1481] facts are as they aver them.

The Court charges you that if you should be reasonably satisfied from the evidence that damages should be awarded in this case for the purpose of punishing the defendant for some wrongdoing committed in connection with the death of Chris Wheeler, then and in that event the Court charges you that such damages in the amount thereof should be measured by and should be in proportion to the gravity and nature of the defendant's wrong and shall not be measured by the value of the deceased's life.

Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. The degree of reprehensibility of defendant's conduct should also be considered.

The Alabama Wrongful Death Act under which the plaintiff sues only allows a recovery for punitive damages, and plaintiff may not recover compensatory damages.

* * * *

ALABAMA CODE ANN. §§ 6-5-391
AND 6-5-410

Alabama Code, § 6-5-391.
Wrongful Death of Minor.

When the death of a minor child is caused by the wrongful act, omission, or negligence of any person, persons or corporation, his or their servants or agents, the father, or the mother in cases mentioned in Section 6-5-390, or, if the father and mother are both dead or if they decline to commence the action, or fail to do so, within six months from the death of the minor, the personal representative of such minor may commence an action, and in any case shall recover such damages as the jury may assess; provided, that an action by any one of them for the wrongful death of the minor shall be a bar to another action either under this section or under Section 6-5-410. (Code 1876, § 2899; Code 1886, § 2588; Code 1896, § 26); Code 1907, § 2485; Code 1923, § 5695; Code 1940, T. 7, § 119.)

Alabama Code, § 6-5-410.

Wrongful act, omission, or negligence causing death.

(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused death.

(b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful, act, ommission, or negligence.

(c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.

(d) Such action must be commenced within two years from and after the death of the testator or intestate. (Code 1852, §§ 1940, 1941; Code 1867, §§ 2299, 2300; Code 1876, §§ 2641-2643; Code 1886, § 2589; Code 1896, § 27; Code 1907, § 2486; Acts 1911, No. 455, p. 484; Code 1923, § 5696; Code 1940, T. 7, § 123.)

Supreme Court, U.S.
FILED
JAN 26 1996
CLERK

No. 95-1038

IN THE
**Supreme Court of the United States**
**OCTOBER TERM, 1995**

LEMOND CONSTRUCTION COMPANY,
*Petitioner,*

*v.*

RICHARD WHEELER,
ADMINISTRATOR OF THE ESTATE OF
CHRISTOPHER GENE WHEELER
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
*OCTOBER TERM, 1995*

---

LEMOND CONSTRUCTION COMPANY,

*Petitioner,*

*v.*

RICHARD WHEELER,
ADMINISTRATOR OF THE ESTATE OF
CHRISTOPHER GENE WHEELER

*Respondent.*

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

The petition challenges a $3.5 million damages award for the wrongful death of respondent's 13-year-old son, who was killed when petitioner's ongoing sewer repair work left the roadway pavement in an unsafe condition, with no warning signs to inform motorists that construction was underway.

The petition presents a single question: whether punitive damages may be imposed in wrongful death cases for "simple negligence." Pet. 26. Unlike many punitive damage cases, such as *BMW of North America v. Gore*, No. 94-896 (pending), this case does not present any question of excessiveness regarding the *amount* of a punitive award. Petitioner's argument does not depend on whether the damage award in this case was $3,500 or $3.5 million. Thus, petitioner "does not ask this Court to formulate guidelines" to judge the size of punitive damages, and petitioner forthrightly concedes that "it is demanding to agree on factors to govern punitive damages." Pet. 26. Accordingly, there would be no reason to hold the

petition in abeyance pending this Court's decision in *BMW*, and petitioner does not request such relief.[1]

*Instead, petitioner asks this Court to grant plenary review.* But such review would be inappropriate, for several reasons:

- Petitioner failed to raise its constitutional argument properly in the Alabama Supreme Court, and the court in fact declined to reach the issue for that reason, so that the judgment in this case rests on an adequate and independent state-law ground.
- In any event, the Alabama Supreme Court expressly held that this was not a "simple negligence" case, but rather involved wanton misconduct by petitioner. Thus, the question ostensibly raised by petitioner is not in fact presented by this case.
- There are further reasons that this wrongful death case is a poor vehicle to address punitive damages issues. The damages in this case are "punitive" in name only, because there is no provision for compensatory damages in Alabama wrongful death actions. Thus, the award here is not readily comparable to punitive awards in other types of lawsuits. And it is difficult to see how defendants are disadvantaged by the Alabama scheme, since punitive damages are subject to extensive procedural and substantive review, both as a matter of Alabama law and as a result of this Court's recent decisions in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), and *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331

---

[1] The case at bar has nothing to do with *BMW*. This is a wrongful death action for a 13-year-old child, not a fraud action for conduct allegedly involving little reprehensibility. The instant case presents no question of extraterritorial punishment and no question of multiple punitive awards for a single course of conduct. It presents no issue of a "ratio" between punitive and compensatory damages, since all damages in a wrongful death action are deemed to be "punitive" under Alabama law.

(1994). In most States, compensatory damages are subject to substantially less rigorous review. Thus, outside Alabama, a jury would have even greater discretion to impose a $3.5 million (or greater) award for the wrongful death of a child due to negligence. Furthermore, adopting petitioner's theory would have the anomalous result of effectively prohibiting *any* damages in Alabama wrongful death cases unless the defendant were guilty of intentional wrongdoing.

- On the merits, petitioner's claim has no merit and would require this Court to overrule a 70-year-old precedent which it only recently reaffirmed in *Haslip*. Petitioner's primary argument is an ill-conceived analogy between punitive damages and criminal punishments that this Court has repeatedly rejected.

The petition should be denied.

## STATEMENT OF THE CASE

The petition contains a lengthy "Statement of the Case" which is in fact a jury argument seeking to minimize petitioner's own culpability for Christopher Wheeler's death. Petitioner's one-sided account, which tellingly is unaccompanied by any citations to the trial record, fails to inform this Court of the extensive evidence supporting the jury verdict and the decisions of the Alabama courts below. Indeed, petitioner's claims are in sharp contrast with the detailed findings of the Alabama courts on several crucial points. There could be no better sign that this case is unworthy of this Court's review than petitioner's need to re-argue facts found by the state courts.

1. *Christopher Wheeler's Wrongful Death.* Petitioner Lemond Contracting, Inc. entered into a contract with the City of Lanett, Alabama for the installation of sanitary sewer lines

in some of the city streets. Pl. Ex. 3.[2] As part of that project, in April 1992 work began on Magnolia Road. R. 1357.

At about 3:30 a.m. on Saturday, June 6, 1992, 15-year-old Jason Colley was driving his father's car on Magnolia Road between 17th Avenue and 18th Avenue when he lost control of the vehicle at the Lemond construction site. The car left the roadway and struck a tree. Chris Wheeler, a passenger in the front seat, was ejected from the auto and killed.

Jason and Chris were best friends who lived across the street from each other. R. 301-303. On the night in question, Chris was "sleeping over" at Jason's house. It was undisputed that the boys did not use any drugs or alcohol. R. 304; R. 184-85 (tests on both were negative for drugs and alcohol). The boys were to leave the next morning with Chris's parents for a trip to Florida. Pet. App. A2.

Sometime after midnight, Jason took his father's car keys from the breakfast bar in the home, and the two boys went riding with Jason driving. He did not yet have a driver's license. The children rode for about a half-mile before returning home without incident. Pet. App. A2. The boys went back to bed. Sometime later in the early morning hours, Chris awakened Jason, and the two decided to take the car for another drive. R. 307.

With Jason driving and Chris in the passenger seat, they again went riding around Lanett. R. 308-09. When Jason attempted to head in the direction of his home, he pulled into a left-turn lane to turn onto a highway marked "Do Not Enter." R. 310. Officer Craig Young of the Lanett Police Department, who observed Jason's car, testified that "then he backed his vehicle back out of the turning lane and went up and stopped at

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[2] References to plaintiff's trial exhibits are styled "Pl. Ex. _." References to the trial record are styled "R. __." References to the Appendix to the Petition for Certiorari are styled "Pet. App. _."

the red signal at the traffic light." R. 255. Officer Young added that the car did not back up "in a sharp manner" but just "[s]lowly backed out" of the turn lane. The police nonetheless decided to follow Chris and Jason. Officer Young came to the conclusion "that he may be lost." R. 255.

When the light turned green, Jason observed a police car following him. R. 310. The car was going between 35 and 45 m.p.h. *Id.* Jason turned off the highway onto 16th Street. The police car followed him and turned on its blue lights. R. 311. Jason reacted by "speed[ing] up a little bit." R. 312. Jason testified that he and Chris were scared and trying to get home. R. 333, 335. Jason made several turns until he was on Magnolia Road. R. 313. The fastest speed he reached was "[p]ossibly seventy miles an hour," before he crossed railroad tracks on Magnolia Road. R. 313. At the tracks, Jason hit a bump in the road and the car became airborne. This scared Jason "a lot" and he slowed down. R. 314. He took his foot off the accelerator as the car went up a hill past the railroad tracks. R. 315. *See* Pet. App. A2-A3 ("after crossing railroad tracks at a high speed, Jason became frightened and slowed down to 35 or 40 miles per hour").

At the railroad tracks, the pursuing police officer lost contact with Jason's car and cut off his siren. R. 1300-01. He testified that he called off the chase because he knew that at the top of the hill was the Lemond construction site. R. 1313. The officer added that he knew that the road was "under construction" and that if he drove his police car through the site he could "tear it up." R. 1316. But the officer agreed that an "unsuspecting motorist" would have no way of knowing that. R. 1322.

At the site, Lemond had erected no warning signs, cones, barricades, warning lights, or illumination or markings of any kind to caution nighttime drivers that construction was underway. R. 162, 315-16. As Jason's car reached the

construction site, it was going 35 to 45 miles per hour. R. 317; R. 330. The posted speed limit was thirty five. R. 162. Jason testified that "it was real rough and it was rocky and . . . I hit a hard bump, and that's when I lost control." R. 317. Police testimony based on "yaw marks" left by the tires in the roadway corroborated Jason's account of his loss of control. R. 178-79, 181-82, 183.

2. *Lemond's Wrongful Conduct.* The evidence demonstrated two elements of wrongdoing by Lemond that led to Chris Wheeler's death.

a. *The Unsafe Condition of the Road.* As a part of the sewer construction project, Lemond dug trenches across the road surface so that sewer pipe could be laid under the road. Pet. App. A4. Once the pipe was laid in the trench, the trench was filled with gravel to within a few inches of the road surface. *Id.* The last few inches of the trench were then filled with "crusher run," a form of crushed stone, prior to eventual final road resurfacing. *Id.*

The Alabama Supreme Court found that "crusher run" "can be dislodged from the trench by vehicular traffic." Pet. App. A4. Police testimony established that the trenches in the roadway at the construction site were approximately three feet wide. R. 154-55. According to the Alabama Supreme Court, the evidence also showed that "the trenches in Magnolia Road were as much as eight inches deep at the time of Chris's fatal accident and that in that condition the road was not safe to drive an automobile on." Pet. App. A4; *see also* R. 154-55, 170-71 (testimony of Officer Meigs); R. 257 (testimony of Officer Young); R. 368-69, 374 (testimony of Deputy Sheriff Sid Lockhart that there were "holes," "ruts", and "problems with the roadway" and that it was unsafe for vehicles traveling the posted speed limit of 35 m.p.h.).

Officer Paul Meigs of the Lanett Police Department testified that, when he drove onto the construction site the day of the

accident, "my vehicle patrol car bottomed out on one of the trenches. . . . The bottom of the car hit." R. 152. Officer Meigs was going "twenty or twenty-five miles an hour." *Id.* He testified that one could not "safely operate a vehicle going the speed limit" due to "the construction of the roadway." R. 153.

Officer Young agreed that, due to the roadway, a vehicle could not be safely operated at a speech of even 25 miles per hour. He testified that, while driving through the site the prior evening at 20 to 25 miles per hour, he had hit an unguarded steel manhole cover and almost lost control of his vehicle. R. 253. He described the "roadway condition" as "terrible," citing the "gravel all over the road" and the "horizontal-type trenches across the roadway." R. 254. Officer Young testified that the conditions the night of the accident were the "same . . . if not worse." *Id.*

Another witness, Sonya Mitchell, testified that when she drove on Magnolia Road at 20-25 miles per hour, her car's wheels were knocked out of alignment and its oil pan was broken. R. 652-54. Her car "bottomed out" 20 feet from the accident scene. *Id.*

Lemond's foreman, Darrell Morton, admitted that Magnolia Road was the most heavily travelled road in the project and that temporary asphalt or bituminous as a temporary level would have done a "better job" of keeping the gravel in the roadway. R. 442-44. He also acknowledged that, in covering up trenches on other jobs, Lemond had used temporary asphalt rather than crusher run. R. 419.

Eddie Hurston is a resident of Lanett living about three or four blocks from the accident scene. He was employed by Lemond and worked on Magnolia Road under the direct supervision of Lemond's foreman. Hurston testified that "[a]ll the time" Lemond had problems with rock being knocked out of the trenches. R. 473. Cars "would pass by and knock

gravel out of the holes. And people complained . . . that their car was getting tore up and knocked out of line and different things." R. 473-74. Hurston added that, after someone complained to himself and the Lemond foreman about damage to an automobile on Magnolia Road, the foreman said, "I'm tired of this bitching about these roads, and we want to go the cheaper way out." R. 474-75. Chris Wheeler was killed about a week later. R. 475.

Dorothy Jean Brooks lived on Magnolia Road and used it every day. She testified that in late May 1992 she hit a deep trench, stalling her car and knocking a hole in her radiator. R. 672-73. She testified that she told the person in charge on the site: "If you all don't get something done about this out here someone is going to get hurt or killed." R. 673. This conversation took place two weeks before the accident.

The trial court held that the contract between the city and Lemond was ambiguous on the issue of whether temporary asphalt rather than crusher stone was required to be used. Pet. App. A5-A7.[3] The court permitted respondent to call as an expert witness Dr. James Harold Deatherage, a professor in the department of civil engineering at the University of Tennessee. Dr. Deatherage had worked for nineteen years as a practicing engineer and as a contractor in construction and had drawn up

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[3] The contract provided:

G. Traffic Restoration

1. The Contractor shall backfill the trench and restore traffic as quickly as possible.

2. He shall either install a temporary bituminous pavement or the binder course, and maintain the temporary surface under traffic for at least 30 days.

3. After subjecting to traffic, he shall remove the temporary pavement and install the wearing course accurately finished to the street grade.

Pl. Ex. 4.

plans and specifications for projects dealing with sewer lines. R. 601-04. He testified that the contract required Lemond to use asphalt rather than crusher stone as filling material.[4] He added that, if stone were used, cars would "knock the gravel out . . . and it's going to create a dangerous condition." R. 610. "[I]t's nearly inconceivable that you could allow traffic to go down through there at a normal rate of speed or allow them to get onto an area where they're going to hit those kinds of depressions." R. 612. Jackson Smith, a superintendent with Lemond who was in charge of the project on Magnolia Road, admitted that "safety" was one reason to use temporary asphalt rather than crusher stone. R. 505.

**b.** *The Failure to Post Warning Signs.* In addition, the evidence showed that Lemond breached its duty to provide adequate construction warnings to motorists, particularly at night. The Alabama Supreme Court found that the road construction area was "unmarked." Pet. App. A3.

Officer Meigs testified that, due to the topography of the hill and roadway, he could not see the construction prior to entering the site. R. 184. Furthermore, "[t]here w[ere] no signs," blinking illuminating lights, or any warnings at all, on "either end" of the construction site. R. 162. Officer Young testified

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[4] "[T]here is a section in here that deals with traffic restoration. And basically it says that the contractor is to backfill the trench with the stone and then in order to get the traffic on it as quickly as possible. Then it says he shall either install a temporary bituminous pavement — asphalt, that's what that means — or the binder course. Now, there is some question as to what binder course is. But, if you turn back here just a couple of pages, binder course is defined. And in this case, binder course is a hot mix, bituminous paving that has to meet an applicable Alabama Highway Department specification they call a city mix. And so then the contractor is required to maintain that asphalt that is put on that ditch — and the reason for putting it up there is to keep the gravel from getting knocked out when traffic goes over it — for at least thirty days." R. 608-09.

that he never saw any warning signs, lights, flags, or other devices at nighttime at the construction site, either on the night of the accident or at any previous time. R. 258. Deputy Lockhart confirmed that there were no warning signs. R. 370-71.

Lemond's foreman testified that the company had an office approximately one mile from Magnolia Road at which there were a "gang" of signs. R. 385. Yet Lemond never put up any signs or warning devices at night. R. 385-87. The foreman testified that Lemond erected warning signs during the day but took them down at night. R. 393.

The contract provided that Lemond was to "[e]rect two (2) warning signs beyond limits of the project, one at least 1,000 feet and one at 500 feet in advance of any place on the Project where operations interfere with the use of the road by traffic, including all intermediate points where the work crosses or coincides with the road." Pl. Ex. 3. The foreman conceded that the company did not comply with this provision. R. 407.

The contract also provided, as Lemond's president acknowledged, that "[t]he contractor shall at his own expense maintain sufficient warning lights, traffic signs, or traffic cones and so forth on or along any of the portion of the street or alley which due to the contractor's operations are not in a normal condition to handle vehicular or pedestrian traffic." Pl. Ex. 3; R. 1351. The contract further specified that "the contractor shall be solely and completely responsible for conditions of the job site," "[i]ncluding safety of all persons and property affected directly or indirectly by his operations during the performance of the work in or about the site of the work, and this requirement shall not be limited in application to normal working hours but shall apply continuous twenty-four hours per day." Pl. Ex. 3.

3. *Proceedings Below.* At trial, petitioner declined to lay the foundation for a contributory negligence defense. Alabama

law creates a rebuttable presumption that children aged 14 and under are incapable of contributory negligence. R. 1532. In the words of the trial judge, petitioner "made a deliberate tactical decision" not to rebut the presumption. *Id.* ("didn't try to rebut it, didn't offer a shred of evidence that would go to that issue").

Instead, Lemond contended that it had done nothing wrong. None of Lemond's witnesses expressed any contrition or pledged to take corrective action in the wake of the tragedy. Lemond's only excuse for its failure to provide warning signs was — in the words of its foreman — that there was "no problem" with the road surface and that it was as "smooth as a table top." R. 407-08. The foreman denied receiving any complaints regarding the condition of Magnolia Road. R. 412.

Lemond's superintendent, Jackson Smith, testified that the company had put up a sign on the eastern end of Magnolia Road notifying west-bound travelers that road construction was underway. R. 498-500. But he was forced to admit that "somebody in management" in Lemond made the deliberate decision "[a]fter reading the specs" *not* to place a sign on the west end of the project notifying east-bound travelers (like Chris and Jason) of the construction. R. 500-01. Furthermore, Smith was forced to reveal that the sign on the east end disappeared during construction and was not replaced prior to the accident. R. 498.

The jury was instructed that it could not award compensatory damages, but only punitive damages: "such damages . . . should be measured by and should be in proportion to the gravity and nature of the defendant's wrong and shall not be measured by the value of the deceased's life." R. 1481.[5] "The

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[5] Contrary to petitioner's erroneous claim that the jury was "required" to impose punitive damages (Pet. 6), the truth is that the judge instructed the jury that the imposition of damages was "discretionary" and that it was free not to

purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future." R. 1479. "Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as the harm that actually has occurred. The degree of reprehensibility of defendant's considered should also be considered." R. 1481. The jury was instructed that the plaintiff was required to prove punitive damages under a standard of clear and convincing evidence. R. 1480.

Although the jury was instructed that it could award damages based on petitioner's negligence as well as petitioner's wantonness, it was also told that, "if there's more culpability, then possibly there should be more damages than if there's less culpability." R. 1460. "Wantonness would be a greater degree of wrong in the case than negligence. And, if you determine that there was wantonness in the case, you could take that into account in assessing the amount of damages in the case." R. 1480.

The jury imposed a $3.5 million damage award. The trial court denied petitioner's motion for a new trial, explaining that "[t]he defendant in this case could certainly foresee that the failure to post warning signs and the maintenance of the roadway with large potholes or depressions in it could likely cause serious injury or death to travelers on the roadway. Both under its contract with the City of Lanett and under applicable law the defendant was under a duty to maintain this roadway in a reasonably safe condition and the jury was certainly entitled to consider its failure to do so as culpable and reprehensible

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impose any damages at all. R. 1479; *see also id.* (providing standards "[s]hould you award punitive damages").

conduct on the part of the defendant." Pet. App. A50.

On appeal, the Alabama Supreme Court did not even reach the constitutional question that petitioner seeks to present to this Court. The Alabama court held that "Lemond's argument on this issue lacks the specificity required in order for this Court to address it." Pet. App. A17. In any event, the Alabama Supreme Court then proceeded to hold that this case does not involve the imposition of punitive damages for "simple negligence" because petitioner was guilty of wanton behavior. *Id.* at A18-A19.

## REASONS FOR DENYING THE WRIT

### I. THERE IS AN INDEPENDENT AND ADEQUATE STATE-LAW GROUND FOR THE JUDGMENT

Petitioner admits that the Alabama Supreme Court "declined to address the constitutional issue" (Pet. 7-8) because the court held that the claim was inadequately presented. *See* Pet. App. A17 ("Lemond's argument on this issue lacks the specificity required in order for this Court to address it. Rule 28(a)(5), Ala. R. App. P.").[6] Petitioner does not, and cannot, deny that such a procedural rule is ordinarily the kind of adequate and independent state ground that bars this Court's review. The state court's decision "'indicates clearly and expressly' that the state ground is an alternative holding." *Sochor v. Florida*, 504 U.S. 527, 533 (1992) (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)).

Petitioner's only response is to rely on a *separate opinion* by

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[6] Rule 28(a)(5) regulates appellate briefs and provides that "[t]he argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on."

Justice Maddox concurring in the judgment below to argue that its constitutional claim was properly presented in accordance with Alabama law. Pet. 8. But Justice Maddox focused on petitioner's *state-law* rather than *federal* claims. He explained that, "[a]s I read [Lemond's] argument, the appellant is pleading with this Court for justice and is asking *this Court* to re-examine much of *its* prior law relating to the award of punitive damages for simple negligence and to the question whether there should be apportionment of damages among joint tort-feasors." Pet. App. A31 (emphases added). Thus, petitioner's efforts to rely on Justice Maddox's opinion are wholly unavailing.

In fact, the only portion of Lemond's brief in the Alabama Supreme Court that referred to a relevant federal constitutional issue was a two-sentence, boilerplate snippet: "'The submission to the jury for the assessment of punitive damages based upon Lemond's simple negligence is in violation of the Fifth, Eighth, and Fourteenth Amendments of the Constitution of the United States of America. No other state or federal court system allows punitive damages for simple negligence.'" Pet. App. A25 (quoting petitioner's brief in the Alabama Supreme Court).

We submit that this cursory language did not properly frame a federal claim. *E.g.*, *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988). In any event, the language is precisely the sort of sweeping, non-particularized language that the Alabama Supreme Court has consistently held is inadequate to trigger that court's review as a matter of state law. *E.g.*, *Alabama Power Co. v. Turner*, 575 So.2d 551, 553 (Ala.) ("Alabama Power's argument that the judgment violates its rights under the Fourth, Fifth, and Sixth Amendments does not identify any specific right it believes has been violated. Alabama Power has also failed to make any specific arguments regarding its constitutional challenges under any of these amendments. As a result, this Court will not address those

arguments."), *cert. denied*, 500 U.S. 953 (1991).

There is no need for this Court to review the Alabama Supreme Court's application of state procedure.

## II. THE QUESTION PRESENTED IS NOT IN FACT RAISED, BECAUSE THE ALABAMA SUPREME COURT HELD THAT THIS IS NOT A NEGLIGENCE CASE

The petition is expressly predicated on the assumption that this case involves nothing more than "simple negligence." Pet. i, 9, 10, 13, 16 n.8, 18, 22. But the Alabama courts found otherwise. The Alabama Supreme Court specifically rejected "Lemond's argument that it was assessed punitive damages based on only negligent conduct, rather than on wanton conduct." Pet. App. A19. The court explained that "the record contains ample evidence to support a jury determination that Lemond's acts or omissions at issue in this case constituted wanton behavior." *Id.* at A18. The state supreme court noted that "'there was creditable evidence before the jury, and indeed it was undisputed, that there were no warning signs placed by the defendant on the approach to the construction area in the direction in which the car occupied by the decedent was being driven.'" *Id.* (quoting the circuit court's post-trial decision). Indeed, the evidence was that Lemond's management made a deliberate decision not to erect proper warning signs.

There was also evidence that Lemond had disregarded complaints about the unsafe condition of the road. The Alabama Supreme Court found that "'[t]here was further evidence before the jury that prior to the accident in question, complaints had been made to the defendant's superintendent in charge of construction about the holes in the road in response to which the superintendent was quoted as saying: "*I'm tired of the bitching about the road. We're going to take the cheapest*

*way out*." One week later the child was killed.'" *Id.* at A18-A19 (emphasis added and quoting the circuit court's post-trial decision).

Furthermore, there was evidence that Lemond had chosen to use a cheaper backfill of crusher stone, rather than the temporary asphalt that was required by its contract with the City. The trial court found that "the manner in which the construction was carried out in this case was designed to profit the defendant over and above what profit it would have normally received had it properly performed its obligations under its contract and under its duties to the public." Pet. App. A50-A51. In sum, there was clearly ample evidence of deliberate wrongdoing.

This Court ordinarily accepts a state appellate court's findings as to "what occurred at the trial" and "the basis of the verdict." *Minneapolis St. P. & S. Ste. M. Ry. v. Moquin*, 283 U.S. 520, 521 (1931). Accordingly, the Alabama Supreme Court's determination that this case involved wantonness rather than simple negligence means that the question presented is not properly before this Court.[7]

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[7] Lemond argues that the jury should not have been instructed that it could base its damages award on negligence and that the award must be vacated because "it is not possible for the jury to specify the basis of its verdict." Pet. 10. This argument is foreclosed by (a) Lemond's failure to request a special interrogatory that could have specified the basis of the verdict, and (b) Lemond's failure specifically to object to the imposition of damages on the basis of negligence. At trial, Lemond filed an amended answer raising a blanket defense that the imposition of punitive damages in this case would be unconstitutional. Pet. App. A55-A56. The trial court properly rejected that defense. Pet. App. A53-A54. At no time did Lemond move for a directed verdict on the ground that damages could not be awarded on the basis of negligence, nor did it object to the jury instructions insofar as they permitted the jury to award damages on the basis of negligence, Tr. 1489-95 (colloquy on jury charge), as it was required to do under Alabama law. Ala. R. Civ. P. 51 (party must object "before the jury retires to consider its verdict, stating

## III. THE ALABAMA SYSTEM FOR IMPOSING DAMAGES IN WRONGFUL DEATH CASES DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner treats this case as a routine punitive damages case no different from the kind encountered by this Court in *Haslip*, *TXO*, and *Oberg*. It is anything but that. This case does not involve the common-law imposition of punitive damages. Since 1860, damages in *statutory* wrongful death actions in Alabama have been labeled "punitive" in response to the common-law ban on compensatory actions for wrongful death. *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). Other jurisdictions have addressed the matter in different ways; many have simply rejected the common-law approach.[8] For 130 years, however, Alabama has followed the course that petitioner now claims to violate the Fourteenth Amendment.[9] The Alabama Supreme Court has noted "[t]he sanctity of human life, the noble goal of preserving human life, and society's desire to punish those whose conduct results in the loss of human life" as factors "accepted by our Legislature" in making a considered legislative judgment to retain the wrongful

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the matter to which he objects and the grounds of his objection"); *General Walker v. Dutton*, 401 So.2d 32 (Ala. 1981).

[8] *See also Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 380 (1970) (extending a common law wrongful action to admiralty law, even though no such action existed by statute, and criticizing the traditional view of *Baker v. Bolton*).

[9] *See Central of Georgia Ry. v. Ellison*, 75 So. 159, 163 (Ala. 1916) (noting creation of punitive damage remedy by 1860 statute); *Alabama Great S.R.R. v. Burgess*, 22 So. 913 (Ala. 1897) (statute allows only punitive damages); *Savannah & Memphis R.R. v. Shearer*, 58 Ala. 672, 680 (1877) ("Prevention of homicide is the purpose of the statute, and this it proposes to accomplish by such pecuniary mulct as the jury 'deem just.'").

death scheme. *Alabama Power Co. v. Turner*, 575 So.2d at 554.

Because there are no "compensatory" damages in wrongful death cases in Alabama, under petitioner's view there could be no damages of *any* kind in Alabama wrongful death actions in the absence of a showing of intentional wrongdoing. Surely the Federal Constitution does not compel such an extraordinary result, which would produce severe under-deterrence and relegate cases involving the loss of human life to a status below that of suits regarding property damage or non-life-threatening injuries.

Petitioner's position is even more anomalous in light of the fact that the legal restrictions on the imposition of damages in Alabama wrongful death cases are far more severe than are limits on the imposition of compensatory damages in most States. The Alabama scheme works to the *benefit* of defendants.

Petitioner repeatedly asserts, without explanation, that Alabama wrongful death awards are "unlimited." Pet. 12, 13, 14, 22. To the contrary: wrongful death damages are closely circumscribed by a system that this Court approved in *Haslip*, 499 U.S. at 18-24, and that was recently strengthened in *Life Ins. Co. of Georgia v. Johnson*, No. 1940357 (Ala. Nov. 17, 1995), by the addition of even more detailed jury instructions. As illustrated by the post-trial hearing in this case (Pet. App. A47-A52), wrongful death awards are reviewed by Alabama courts under an 11-factor test taken from *Green Oil v. Hornsby*, 539 So.2d 219 (Ala. 1989), and *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). These factors include:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the

> defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

499 U.S. at 21-22 This Court held that the application of these standards "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. . . . These standards have real effect when applied by the Alabama Supreme Court to jury awards." *Id.* at 22.

In *Haslip*, this Court also observed that "[t]he discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding 'the best interests of the child,' or 'reasonable care,' or 'due diligence,' or appropriate compensation for pain and suffering or mental anguish." *Id.* at 20. Indeed, it appears that the Alabama scheme for imposing damages in wrongful death cases is more rigorous than the systems for imposing compensatory damages in many States.[10]

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[10] *E.g.*, *Samsel v. Wheeler Transp. Servs.*, 789 P.2d 541, 552 (Kan. 1990) (in cases involving noneconomic loss, "there is no clear method for measuring the loss and determining the amount of compensation due"); D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES 544 (1973) ("there is almost no method at all" of measuring pain and suffering awards); Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 906-08 (1991) ("Noneconomic damage awards are often quite large, and juries are given no specific guidance in deciding how large . . . .

Because "the value of human life has no measure," *Alabama Power Co. v. Turner*, 575 So.2d at 554, compensatory damages in wrongful death cases — particularly those involving children — would include a largely subjective component. For example, a jury asked to impose compensatory damages for the death of a 13-year-old child would be forced to engage in considerable speculation in assessing an essentially non-economic loss — the hedonic value of the enjoyment of life. Even determining the child's future earnings would entail conjecture as to whether he would have completed high school; whether he would have attended college; whether he would have gone on to graduate school; and what sort of employment he might eventually have chosen. Hence, it is not surprising that the award in this case is quite modest in size in comparison to compensatory damages often awarded for less serious harms.[11]

For all these reasons, the imposition of damages under Alabama wrongful death law does not warrant this Court's review.

## IV. THE QUESTION PRESENTED HAS NO MERIT

Accepting petitioner's position would require this Court to overrule *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), where this Court rejected a constitutional challenge to

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If leaving the amount of punitive damages to the sound discretion of the jury offends the procedural guarantees of the fifth amendment, logically the common law discretion of juries to fix the amount of noneconomic damages is similarly defective.").

[11] *See, e.g., DeBiaso v. Illinois Central R.R.*, 52 F.3d 678, 688 (7th Cir. 1995) (upholding over $4 million in damages for loss of left arm, and listing Illinois verdicts of $2.3 million in damages for back injury that required no continued medical care and allowed victim to lift objects weighing as much as 50 pounds; $3.5 million for injured kneecap; and $9 million for arm amputation).

the very same Alabama policy of awarding punitive damages in wrongful death actions. This Court recognized the longstanding nature of Alabama's policy and that "the purpose of Alabama's wrongful death act is to strike at the evil of the negligent destruction of human life." *Id.* at 114, 116. This Court observed that many States had permitted the imposition of punitive damages without any personal fault at all through the doctrine of respondeat superior, *id.* at 115, and noted that the Federal Constitution did not prevent "the legislative creation of new rights and duties for the prevention of wrong or for satisfying social and economic needs." *Id.* at 116. This Court concluded, with respect to the Alabama statute, that "[w]e cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive." *Id.*

Petitioner attempts to distinguish *Pizitz* as involving the law respondeat superior. Yet that factor cuts sharply *against* petitioner in this case. *Pizitz* involved a department store held liable under respondeat superior for the negligent act of an employee. 274 U.S. at 114. Thus, *neither* the employee nor the employer exhibited any deliberate intent to injure, and the employer itself was held liable *without any showing of any fault at all*. Such liability for punitive damages is much more attenuated than in this case, where Lemond itself was at least negligent, if not wanton, in its actions.

Petitioner claims also that "[q]uite a bit has changed in 68 years." Pet. 15. Yet the constitutional principles underlying *Pizitz* have remained the same. *E.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Indeed, this Court recently reaffirmed *Pizitz* in the course of upholding the imposition of punitive damages on a theory of respondeat superior. *See Haslip*, 499 U.S. at 15 ("These and other cases in a broad range of civil and criminal contexts make clear that imposing such liability is not fundamentally unfair and does not in itself

violate the Due Process Clause.").

If punitive damages can be imposed in the absence of any showing of independent fault at all — as in the respondeat superior context or in products liability actions founded on strict liability in tort[12] — it is impossible to see how the imposition of punitive damages for negligence can raise any federal constitutional issue at all. Indeed, in *Smith v. Wade*, 461 U.S. 30 (1983), this Court canvassed the historical record and concluded that, by the time of the Fourteenth Amendment's framing, "[t]he large majority of state and lower federal courts were in agreement that punitive damages awards did not require a showing of actual malicious intent"; they permitted punitive awards "on a showing of negligence, recklessness, disregard for or indifference to the rights of others, and various other standards short of actual ill will or injurious intent." *Id.* at 45 & n.12.[13] Even acts done in good faith could provide the basis

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[12] *See, e.g.*, Annot., *Allowance of Punitive Damages in Products Liability Case*, 13 A.L.R.4th 52 (1994); *American Laundry Machinery Indus. v. Horan*, 412 A.2d 407, 418-19 (Md. 1980) ("punitive damages are available in product liability actions based upon the manufacturer's negligence").

[13] "'Malice,' as used by courts and lawyers in the last century, was a hopelessly versatile and ambiguous term, carrying a broad spectrum of meanings." 461 U.S. at 41 n.8. "[I]t was often used without modification to mean what was sometimes called 'implied malice' — a purely fictional malice that was conclusively presumed to exist whenever a tort resulted from a voluntary act, even if no harm was intended." *Id.* In this sense, the term could be used even in negligence cases as a ground for punitive damages. *E.g., Childers v. San Jose Mercury Printing & Publishing Co.*, 105 Cal. 284, 289, 38 P. 903, 904-905 (1894). Moreover, "'willfulness' did not mean intent to cause injury, but only voluntary action." 461 U.S. at 41 n.8. "Wilful . . . generally, as used in courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent. And wilfully does not

for punitive damages.[14]

Thus, petitioner is simply wrong is characterizing the Alabama approach as unique. Pet. 10.[15] In fact, the longstanding rule has been that the negligent breach of a duty endangering the public is deemed to be "gross negligence" and is a commonly accepted basis for punitive damages. This rule is of special relevance relevance to wrongful death actions in general, and to the instant case involving construction on a public road in particular, for here the threat to public safety was obvious. Accordingly, it could not have been error in this case to instruct the jury that punitive damages could be imposed on the basis of negligence. "For injuries resulting from a neglect of duties, in the discharge of which the public is interested, juries are also permitted to assess exemplary damages. These may be perhaps considered as falling under the head of cases of gross negligence, for any neglect of duties imposed for the protection of life or property is culpable, and deserves punishment." *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885). In *Humes*, the negligent failure of a railroad to maintain fences and cattle guards was held to be a

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imply that an act done in that spirit was necessarily a malicious act. . . ." 30 American and English Encyclopedia of Law 529-530 (2d ed. 1905) (footnote omitted).

[14] *E.g.*, *Best v. Allen*, 30 Ill. 30 (1862) (defendant subject to punitive damages notwithstanding fact that he made entry in good faith, supposing that he had legal right to do so); *Raynor v. Nims*, 37 Mich. 34 (1877) (defendant's good faith belief that he had legal right to eject plaintiff does not prevent imposition of punitive damages).

[15] The only cited support for petitioner's sweeping statement that "Alabama is the only state in the union" to impose punitive damages on the basis of negligence, Pet. 10, proves nothing of the kind. *Tatum v. Schering Corp.*, 523 So.2d 1042, 1052-56 (Ala. 1988) (indicating only that other States permit compensatory damages in wrongful death cases).

sufficient basis for punitive damages.[16] In *Linsley v. Bushnell*, 15 Conn. 225, 235 (1842), the court held that punitive damages were appropriate where the defendant "wrongfully and negligently" left an obstruction on a public highway, causing a night-time collision with plaintiff's wagon — a scenario that is quite analogous to the instant case (putting aside, of course, the evidence of Lemond's wantonness).[17]

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[16] "The omission to erect and maintain such fences and cattle guards in the face of the law would justly be deemed gross negligence, and if, in such cases, where injuries to property are committed, something beyond compensatory damages may be awarded to the owner by way of punishment . . . ." 115 U.S. at 522.

[17] *See also Minneapolis & St. Louis R. Co. v. Beckwith*, 129 U.S. 26, 34 (1889) (affirming "the obligation of the defendant railway company to use reasonable means to keep its track clear, so as to ensure safety in the movement of its trains," and explaining that if "the company omits those means, the omission may well be regarded as evidence of such culpable negligence as to justify punitive damages where injury is committed"); *Welch v. Durand*, 36 Conn. 182 (1869) (punitive damages for "culpable neglect"); *Maysville & Lexington R. Co. v. Herrick*, 76 Ky. 122, 127 (1877) (holding that the trial court correctly refused to instruct the jury that "willful or intentional wrong" was required to award punitive damages in a railroad accident case: "The absence of slight care in the management of a railroad train, or in keeping a railroad track in repair, is gross negligence; and to enable a passenger to recover punitive damages, in a case like this, it is not necessary to show the absence of all care, or 'reckless indifference to the safety of . . . passengers,' or 'intentional misconduct' on the part of the agents and officers of the company") (ellipsis in original); *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 219, 225 (1869) (punitive damages for "willful negligence" and "mere carelessness"); *Buckley v. Knapp*, 48 Mo. 152, 162 (1871) ("where there are circumstances of oppression, malice, *or* negligence, exemplary damages are allowed) (emphasis added); *Whipple v. Walpole*, 10 N.H. 130, 132 (1839) (exemplary damages appropriate in action for damages for defect in a bridge, which collapsed: "This is an action on the case; and brought for the neglect of a duty, in which the public at large have a deep interest. . . . Upon these structures we necessarily intrust our property and our persons; and by a neglect of this duty the lives of many are endangered. In

Finally, petitioner contends that this Court should impose an intent requirement by analogizing punitive damages to criminal punishment. Pet. 23-25. Although this Court has sometimes described punitive damages as "quasi-criminal," *Haslip*, 499 U.S. at 19, it has steadfastly declined to transplant the rules of criminal procedure into punitive damages law. *E.g.*, *Haslip*, 499 U.S. at 23 n.11 (refusing to impose any evidentiary standard higher than preponderance); *id.* at 23 (rejecting analogy to criminal fines in judging excessiveness); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (rejecting application of Excessive Fines Clause); *United States v. Halper*, 490 U.S. 435, 450 (1989) (rejecting application of Double Jeopardy Clause).

Punitive damages remain private civil remedies that do not involve public prosecution or the stigma of criminal punishment. Hence, they should not trigger any of the concerns that have sometimes led this Court to infer *mens rea* requirements in criminal cases. *E.g.*, *Staples v. United States*, 114 S. Ct. 1793 (1994). Moreover, petitioner mischaracterizes the nature of this Court's approach in criminal cases. This Court has held that, absent clear statutory language to the contrary, it will presume as a rule of construction that Congress meant to include a *mens rea* requirement in the law. This

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this very case, in consequence of the neglect of the defendants, three individuals were suddenly destroyed, and others exposed to most imminent peril."); *Caldwell v. New Jersey Steamboat Co.*, 47 N.Y. 282, 296 (1872) ("Exemplary damages may be allowed not only in vindictive actions so called, such as assault and battery, false imprisonment, defamation, and the like, but also in cases based upon negligence."); *Lake Shore & M. S. R. Co. v. Rosenzweig*, 113 Pa. 519, 544 (1886) (allowing punitive damages against railroad where "there was no willful misconduct by the conductor" in ejecting passenger from train); *Earl v. Tupper*, 45 Vt. 275, 286 (1873) (exemplary damages available if conduct "was attended with malice, oppression, . . . *or* negligence") (emphasis added).

Court has never suggested that an intent requirement is constitutionally mandated. Indeed, this Court has upheld statutes imposing criminal penalties on the basis of strict liability, with *no* showing of fault at all. *E.g.*, *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971) (hazardous materials); *United States v. Dotterweich*, 320 U.S. 277 (1943) (impure food and drugs); *United States v. Balint*, 258 U.S. 250 (1922) (narcotics).[18]

These public welfare statutes render criminal "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota v. United States*, 471 U.S. 419, 433 (1985). The Alabama wrongful death scheme similarly addresses important matters of concern to the community: activities resulting in the loss of human life. Accordingly, the Alabama system falls precisely within the area in which this Court has indicated, even in the criminal realm, that a showing of intent is not required for the imposition of liability.

For all these reasons, there can be no constitutional objection to the imposition of punitive damages in wrongful death cases on the basis of negligence.[19]

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[18] At common law, "[n]ot only were there crimes of recklessness or negligence (such as reckless homicide), but even crimes of intent commonly required only intent to do the criminal act (and, in some cases, knowledge that the injury would likely follow), rather than actual ill will or purpose to inflict an injury." *Smith v. Wade*, 461 U.S. at 43 n.9.

[19] Nor could there be any constitutional basis for an objection to the non-apportionment of damages. Petitioner cites no constitutional principle — and there is none — requiring States to apportion liability among multiple tortfeasors. Indeed, comparative fault statutes are of relatively recent origin. The traditional view was that each joint tortfeasor could be held liable for the entire result of his joint tort, regardless of his comparative degree of fault or whether he personally committed each of the acts that combined to make the

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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January 26, 1996

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tort. William L. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 418 (1937); Thomas M. Cooley, Law of Torts 153 (2d ed. 1888) (each defendant is "compelled to assume and bear responsibility for the misconduct of all").

Supreme Court, U.S.
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(3)

No. 95-1038

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

LEMOND CONSTRUCTION COMPANY,

Petitioner,

v.

RICHARD WHEELER,
ADMINISTRATOR OF THE ESTATE OF
CHRISTOPHER GENE WHEELER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

# REPLY BRIEF

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16 pp

## LIST OF PARENT COMPANIES OR NONWHOLLY OWNED SUBSIDIARIES

There are no parent companies or nonwholly owned subsidiaries of Lemond Construction Company.

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## ARGUMENT

Respondent Wheeler does not distinguish this $3.5 million punitive damage award to punish for simple negligence from the intentional fraud judgments of BMW of North America v. Gore, No. 94-896; Browning-Ferris Industries of Vermont, Inc. v. Kelco, 492 U.S. 257 (1989); TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993); Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991); and Life Insurance Co. of Georgia v. Johnson, No. 1940357 (Ala. Nov. 17, 1995). Rather, Wheeler has raised a number of procedural and factual arguments that do not answer Lemond's brief. True, this is an Alabama problem since it is the only jurisdiction to impose punitive damages for simple negligence. However, this scheme deprives all defendants, whether automobile drivers, physicians, contractors, manufacturers, or others, of due process when sued for wrongful death.

### I. REVIEW BY THIS COURT IS REQUIRED TO VINDICATE A FEDERAL RIGHT WHICH HAS BEEN DENIED BY THE DECISION BELOW.

Wheeler fails to address the decisions of this Court, cited in Lemond's brief, which conflict with the imposition of punitive damages for simple negligence. Instead, Wheeler first claims that the Supreme Court of Alabama did not base its decision on any federal constitutional issues. In actuality, the majority of justices on the Supreme Court of Alabama merely elected to ignore the important federal constitutional issue presented by contending it had not been raised with "the specificity required in order for this Court to address it," citing Ala. R.

App. P. 28(a)(5) (App. at A-17).[1] Justice Maddox pointed out in his concurring opinion that this assertion was patently incorrect, and proved it by reprinting in his opinion the four-page section of Lemond's brief to the Supreme Court of Alabama in which the issue was clearly and specifically raised. This section of the brief was headed with the statement: "DEFENDANTS SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS, AS WELL AS OTHER CONSTITUTIONAL RIGHTS, WERE VIOLATED BY THE IMPOSITION OF A $3,500,000 PUNITIVE DAMAGES VERDICT FOR SIMPLE NEGLIGENCE WITHOUT APPORTIONMENT BASED ON DEGREE OF CULPABILITY AND WITHOUT ADEQUATE STANDARDS FOR REVIEW" (App. at 23-24). The argument within this section of the brief cited the due process clause of the fourteenth amendment and this Court's opinion in Haslip, as well as the dissenting opinions in several Alabama decisions which had discussed the impropriety of assessing punitive damages for acts of simple negligence. Lemond also attached copies of the fifth and fourteenth amendments.

Contrary to Wheeler's assertions, this Court plainly has the authority to

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[1]Ala. R. App. P. 28(a)(5) states:

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

. . . .

(5) An argument (The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on)[.]

review any case arising from a state court in which a federal issue was timely raised and pressed in the state court, regardless of how the matter was resolved below. The Supreme Court's jurisdiction does not depend on whether the state court addressed the question; it is enough that a federal claim was made, and not accepted. See, Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) (motion to recuse a justice formed the basis of a due process appeal in this Court despite fact that it was not addressed by Alabama Supreme Court); see also Illinois v. Gates, 462 U.S. 213, 218 n.1 (1983); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-35 (1940); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). Moreover, this Court makes the decision as to whether the constitutional issue was adequately raised below. In Taylor v. Illinois, 484 U.S. 400, 406 n.9 (1988), the Court rejected the argument that the Court should decline jurisdiction because petitioner's sixth amendment claim had not been adequately presented to the state courts. The Court examined petitioner's brief before the Illinois Court of Appeals and found petitioner had raised the claim by virtue of citations to court decisions in which the issue was addressed. Despite the fact that the issue had not been addressed or even directly presented to the state courts, the Supreme Court agreed to resolve the issue.

The issue before this Court was squarely presented to the trial judge before, during, and after trial (App. at 53, 55, 57-59), and was specifically raised in the brief to the Supreme Court of Alabama (App. at 23-31), a fact acknowledged by Justice Maddox of that court (App. at 23). There can be no question

but that this Court has the jurisdiction under 28 U.S.C. § 1257 to resolve the important due process issue presented.

II. THE CASE WAS SUBMITTED TO THE JURY ON A THEORY OF SIMPLE NEGLIGENCE WHICH ALLOWED ONLY PUNITIVE DAMAGES AS WELL AS ON A THEORY OF WANTONNESS.

Wheeler has misled this Court in arguing that the courts below concluded that Lemond was found to have acted with other than simple negligence (Brief in Opposition at 15, 16). The lower courts did not make such a finding. Wheeler introduced some evidence which could be characterized as showing something other than simple negligence. The veracity and reliability of this evidence was strongly disputed.[2] Simply stated, the trial court and the Supreme Court of Alabama found only that there was sufficient evidence to submit the case to the jury on a theory of wanton behavior. Nothing in the record or the opinions of the courts below supports Wheeler's assertion that the verdict actually rested upon a finding of wantonness. Based on the instructions given at trial (App. at 60-64) and the record, it is clear that the jury could have reached its verdict based on simple negligence.

This case presents the issue of the constitutionality of the imposition of punitive damages for simple negligence as squarely as possible in light of the

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[2]The trial judge stated during argument on Lemond's motion for directed verdict, "Well, I'll be honest with you. I'm not sure that I have seen any evidence that would constitute wantonness" (R. at 1375).

procedures inherent in the Alabama system for assessing damages for wrongful deaths.

## III. THE ALABAMA SYSTEM FOR IMPOSING DAMAGES IN WRONGFUL DEATH CASES VIOLATES THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT.

Lemond has emphasized that this "negligence/wrongful death" case is quite distinguishable from the "intentional conduct/fraud" cases previously addressed by this Court. It has never treated this as a routine case no different from other punitive damage decisions (Brief in Opposition at 17). Wheeler fails to identify any other jurisdiction which now allows, or has ever allowed, the imposition of punitive damages for simple negligence--whether such negligence results in injury or death. Wheeler fails to rebut the numerous cases cited by Lemond indicating that imposing punitive damages for negligent conduct does not pass muster under our concept of due process.

Wheeler attempts to mislead this Court by stating, "wrongful death damages are closely circumscribed by a system that this Court approved in Haslip, supra, 499 U.S. at 18-24, and that was recently strengthened in Life Insurance Co. of Georgia, supra, by the addition of even more detailed jury instructions" (Brief in Opposition at 18). However, the decision actually states: "We hold that hereafter in all cases where punitive damages are sought, excluding actions based upon wrongful death, . . . the trial shall be bifurcated in accordance with the procedure set out in Justice Houston's special concurrence in Charter Hospital of Mobile v. Weinberg, supra." Indeed, Wheeler's brief fails to disclose that wrongful

death actions are excluded from the chapter of the civil practice statutes which governs damages, and specifically punitive damages. See Ala. Code Ann. §§ 6-11-1 et seq., 6-11-20, 6-11-29.

Wheeler also asserts that the punitive damages awarded against Lemond were punitive in name only, and that they were really more in the nature of compensatory damages (Brief in Opposition at 17). He then makes the unfounded claim that "under petitioner's view there could be no damages of any kind in Alabama wrongful death actions in the absence of a showing of intentional wrongdoing" (Id. at 18).

These statements are nonsense. First, there can be no doubt that the damages imposed against Lemond were indeed punitive damages. An examination of the instructions to the jury on the damages issue removes any doubt that the damages award was reached based on the same factors which juries use in all punitive damages cases in Alabama (App. at 62-64). Second, there is nothing to preclude the Alabama courts from permitting the imposition of compensatory damages in wrongful death cases. The uniqueness of the Alabama wrongful death system is a function of the consistent misinterpretation of the Alabama wrongful death statutes. See Tatum v. Schering, 523 So. 2d 1042, 1047-63 (Ala. 1988) (Houston, J., dissenting); Rose v. Rogers, 632 So. 2d 434, 435 (Ala. 1993) (Houston, J., dissenting). Wheeler himself concedes that other jurisdictions have had no difficulty in permitting compensatory damages in wrongful death cases despite the common-law ban on such damages.

Lemond never argued that there should be no damages in wrongful death actions except where intentional misconduct has been proven. Rather, Lemond's position is that the imposition of punitive damages against a party who has been merely negligent is unconstitutional. This position is consistent with this Court's determination that such damages are constitutional if used to punish persons who have harmed others through actions which were intentional, malicious, or wanton. See TXO Production Corp., supra; Haslip, supra; Smith v. Wade, 461 U.S. 30 (1983).

Lemond does not argue against respondeat superior, which this Court addressed in Louis Pizitz Dry Goods v. Yeldell, 274 U.S. 112 (1927). A corporation is liable for the conduct of its employees. If the conduct deserves punishment then the employer is responsible. That is not the issue here. The issue is rather the Alabama scheme which mandates only punitive damages for simply negligent conduct. The $7,500 verdict in 1927 against Pizitz Dry Goods is equal to only $206,976 in 1996 based on a 5% annual index. This $3.5 million award illustrates how the due process problem has manifested itself since then.

## IV. NO OTHER JURISDICTION ALLOWS PUNITIVE DAMAGES FOR SIMPLE NEGLIGENCE.

Section IV of Wheeler's brief argues in part that Lemond's position has no merit because other jurisdictions have long recognized the propriety of imposing punitive damages for simple negligence. He then cites 13 cases dating from 1839 to 1889. Wheeler has misstated their holdings. The cases substantiate Lemond's position that in jurisdictions other than

Alabama, punitive damages could not be assessed for merely negligent acts. In Missouri Pacific Railway v. Humes, 115 U.S. 512 (1885), the Court approved the awarding of punitive damages not on the basis of simple negligence but rather on the basis of a railroad's conscious decision to ignore a statutorily imposed duty to erect fencing along its right of way to protect livestock on adjacent property. The Court stated that punitive damages were appropriately imposed "whenever malice, gross neglect, or oppression has caused or accompanied the injury complained of." Id. at 521. Equally unhelpful to Wheeler is Minneapolis & St. Louis Railway v. Beckwith, 129 U.S. 26 (1889), in which the Court approved damages in the amount of double the actual loss arising out of the death of the plaintiff's three hogs on tracks in an area which the railroad had a right to fence. The damages were not awarded for the inaction of the railroad with regard to fencing, but were imposed pursuant to a statutory provision which authorized the award of double damages against a railroad if it failed to pay for livestock killed on its tracks within 30 days of a demand. In short, the punitive damages rested on the failure to pay when requested and not on any negligence. See also, e.g., Welch v. Durand, 36 Conn. 182, 185 (1869) (plaintiff in tort case awarded expenses of litigation in addition to damages where defendant shot him and action was "wanton, reckless, without due care, and grossly negligent"); Linsley v. Bushnell, 15 Conn. 225, 236 (1842) (defendant refused to remove his wagon loaded with wood which someone else had overturned in road; when traveler was injured after hitting wagon, defendant was liable for vindictive damages because defendant's refusal was "wanton or mali-

cious"); Best v. Allen, 30 Ill. 30 (1862) (defendant in trespass case subject to punitive damages not on basis of entry, which was made in good faith, but because he willfully damaged plaintiff's goods, which he knew he had no right to do); Lake Shore & Michigan Southern Railway v. Rosenzweig, 113 Pa. 519, 544 (1886) (exemplary damages awarded where conductor forcibly removed plaintiff from train in dangerous area; such damages appropriate where there is "wilful misconduct, or that entire want of care which would raise a presumption of conscious indifference to consequences"); Whipple v. Walpole, 10 N.H. 130, 130 (1839) (jury instructed that "for ordinary neglect the plaintiff could not recover exemplary damages; but that such damages might be allowed, in the discretion of the jury, in case they believed there had been gross negligence on the part of the defendants" (emphasis in original)); Caldwell v. New Jersey Steamboat Co., 47 N.Y. 282, 297 (1872) (exemplary damages allowed where conduct was "wanton or grossly negligent," but not for "simple negligence"); Earl v. Tupper, 45 Vt. 275, 288 (1873) (plaintiff awarded punitive damages in assault case; defendant beat pregnant woman; "such damages are given to stamp the condemnation of the jury upon the acts of the defendant on account of the malicious or oppressive character of the acts").

Citing a Maryland case and an A.L.R. annotation, Wheeler further claims that punitive damages are routine in strict liability actions, and thus "it is impossible to see how the imposition of punitive damages for negligence can raise any federal constitutional issue at all" (Brief in Opposition at 22). The authority does not support the proposition for

which it was cited. American Laundry Machinery Industries v. Horan, 45 Md. App. 97, 412 A.2d 407, 419 (1980), held that while punitive damages are available in product liability cases, they may be imposed only where the facts show that the defendant exhibited "wanton or reckless disregard for the rights of others." American Laundry Machinery reversed the trial court's imposition of punitive damages against the defendant, finding that the evidence showed only simple negligence on the part of the defendant manufacturer and holding that "wanton and reckless conduct requires far more than mere negligence." 412 A.2d at 420.

The general rule in other jurisdictions allows courts to award compensatory damages for negligence and, in addition, punitive damages if a more substantial degree of conduct is proven. The Alabama scheme, which permits only punitive damages regardless of the degree of culpability, is indeed a departure from long-established practice and does not conform to the common law as it existed at the time of the adoption of the fourteenth amendment. For the reasons set out in Lemond's petition, this Court must grant certiorari in this case and conclude that the Alabama system violates due process.

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